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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PETER SEKINOFF,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT FOR ALASKA, DIVISION NUMBER ONE

Brief of Plaintiff in Error

JAMES WICKERSHAM
J. W. KEHOE,
Attorneys for Plaintiff in Error.

Juneau Daily Capital Print.

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STATEMENT OF THE CASE

An indictment was returned against the plaintiff in error at Juneau, Alaska, on October 11, 1921, charging that on July 1, 1921, he " did, the said Peter Sekinoff being then and there over the age of sixteen years, knowingly, wilfully, wrongfully, unlawfully, feloniously carnally know and abuse Sonia Malachoff, the said Sonia Malachoff being then and there a female person and then and there under the

age of sixteen years, to-wit, of the age of eleven years, and the said Peter Sekinoff not being then and there the husband of said Sonia Malachoff."

The indictment states in its heading that it is based on "Section 1894, C. L. A.," or Compiled Laws of Alaska, 1913, which section reads as follows:

> "Sec. 1894. That whoever has carnal knowledge of a female person, forcibly and against her will, or, being sixteen years of age, carnally knows and abuses a female person under sixteen years of age, with her consent, is guilty of rape."

Defendant was tried on October 19-20, and the jury returned a verdict of Guilty of Assault with Intent to Commit Rape. A motion for new trial was denied and he was sentenced to serve six years in the penitentiary.

The evidence in the transcript shows the defendant is a Russian from the Black Sea region, but a few years in the United States, and unable to speak or read and write the English language. The prosecuting witnesses, the Malachoffs, are also of Russian blood, but born and raised at Sitka, Alaska. They speak the English language, and are otherwise well acquainted with the customs and laws of the region in which they live, and therein had a very great advantage over the defendant. The latter is a miner and has engaged in that work in various parts of the Territory of Alaska; he had also accumulated a small sum of money. The evidence shows the Malachoffs were in need of money and got it from Sekinoff through pretending friendship for

him as one of their own nationality; at their request he loaned them some $850.00, for which they gave him their note and a mortgage on a worthless piece of real estate. No part of the loan has been repaid.

The Malachoffs have six children; defendant was a frequent visitor at their house and the children all seemed fond of him. Things went along in a friendly way, the Malachoffs seeking to get him to invest in a mine they claimed to own at Sitka, and in other enterprises, until their note became due, and Sekinoff sought to recover interest, rent, or some return on the loans. On the very day that Sekinoff's attorney visited the Malachoff house to get an understanding about the return of his loan, or some payment thereon, the Malachoffs went to the officials to make complaint against him for this offense.

Mrs. Malachoff is the moving influence in the case; her character is mildly sketched by Mrs. Kashaveroff, who has known her for many years, P. 77, Tr., and by her own offensive language in relating her story of an alleged attempt by Sekinoff to rape her person, at some time prior to the date when she wheedled him out of $850.00,—the loan made to her and her husband by Sekinoff. Notwithstanding this alleged assault upon her honor, Mrs. Malachoff testified she dissembled and hid the facts from her own husband while they were getting the loan, and after that date until the time for payment, and even then until something was needed to support the same kind of a story told by her daughter. Then and not until did she relate her own evil and utterly immaterial story to the court and jury.

SPECIFICATION OF ERRORS

Counsel for Plaintiff in Error intends to urge and assert the following as the most potent of those errors committed on the trial below:

I

Insufficiency of the evidence to justify the verdict and that the verdict is against the law.

II.

Error in law occurring at the trial and excepted to by the defendant.

III.

Error in the court in giving instruction number XI, excepted to.

IV.

Error in giving instruction number XIII, excepted to.

V.

Error in refusing to give instruction set out as number III. in the Assignment of Error herein.

VI.

Error in instructions XI. and XIII., in failing and refusing to give full and sufficient instructions on the law of attempts to commit the crime charged, or included crimes, or in the lessor degrees thereof.

VII.

Error in the court in instructing the jury that it might find the defendant guilty of assault with intent to commit rape under the indictment in this case.

VIII.

Error of the court in not giving, of its own motion, those statutory charges required by the laws

of Alaska, stated in paragraphs 7, 8, and 9 in the Assignment of Errors in this case.

IX.

Error in overruling the motion for a new trial.

X.

Error in receiving the verdict of the jury herein finding the defendant guilty of assault with intent to commit rape, and in pronouncing sentence against the defendant upon such verdict.

POINTS AND AUTHORITIES

1. *Insufficiency of the evidence to justify the verdict and that the verdict is against the law.*

Upon the making of the motion for a new trial the foregoing statutory objection was urged in support thereof and overruled, and assigned as error. P. 159, Tr.

The record shows that only a single witness, Sonia Malachoff, the prosecuting witness, testified to any material fact against the defendant, connecting him in any way with the crime charged. The record also shows the jury utterly refused to accept her story as true, and refused to return a verdict based on her evidence; but misled by the hearsay statements of other impressive witnesses and the misleading instructions of the court, found defendant guilty of an independent crime, not included in that charged in the indictment.

The defendant was charged with the crime of statutory rape upon the person of Sonia Malachoff, at Juneau, Alaska, on the 1st day of July, 1921, as

stated in the indictment, P. 1, Tr.

No direct evidence in relation to the crime charged was offered by any witness, except by Sonia Malachoff, the prosecuting witness, and Sekinoff, the defendant. She swore to the facts positively, showing the actual commission of the crime of Statutory rape upon her person, with her consent, five or six times, at as many different times, beginning in the month of May, 1921, while the defendant as positively denied the facts alleged by her.

(a) HEARSAY TESTIMONY BASIS OF CONVICTION

Mrs. A. P. Kashaveroff, a member of the board of Childrens Guardians, and Mrs. S. M. Malachoff, the mother of the prosecuting witness, were called by the Government and allowed to repeat at great length and with much force, certain conversations they had with Sonia Malachoff, at a date long after the commission of the crimes charged, and were permitted without objection to relate the inquiries they made and the answers thereto, to the jury. Their whole testimony, (Pages 73 and 81, Tr.) is the rankest hearsay and in violation of the rule stated by this court in another Alaskan case of this kind.

Callahan v. United States, 240 Fed. 683.

In the Callahan case the court said:

> "In the case at bar there is entire absence of circumstances to justify the admission of testimony such as that given by Laura Harrington. The statement of which she testified was made to her, not as a complaint, not as an expression of outraged feeling, not under excitement produced by an external shock, but pure-

ly as a matter of interesting information in a casual conversation between two intimate friends. It cannot be said that its admission was harmless error, for the plaintiff in error and Grace Carey were the only witnesses who testified concerning what transpired between them. Their testimony was sharply contradictory, and the evidence of Laura Harrington was admitted for the purpose of corroborating the testimony of Grace Carey."

Calahan v. United States, 240 Fed. 683 (685).

In an Oregon case (State v. Sargent, 32 Ore. 110; 49 Pac. 889). the court said:

"In the case at bar, Mrs. Robbins, by a sweeping sentence, in effect testified to all that the two girls had told her concerning the alleged assault upon Bessie by the defendant, and under the rule it was error to permit it. This could not be deemed less than a repetition of the children's narrative of the occurrence, and therefore subject to the very pertinent objection that it was hearsay. It was proper for the mother to testify to the fact that Bessie had made the disclosure, and to describe her manner and appearance at the time, and the condition in which she found her person upon examination made, but not to relate what the girls had told her touching the particulars of what transpired relative to the alleged assault. For this error the case must be reversed."

State v. Sargent, 32 Ore. 110; 49 Pac. 889.

An attempt was made by the prosecution to get from Mrs. Malachoff, the mother of the prosecuting witness, one pretended fact of corroboration concerning the presence of seminal matter on the undergarments of her daughter. (P. 84, Tr.) She said that weeks after these soiled clothes had been placed in the mass of dirty garments she did the family washing and then saw this seminal stain upon them. But these and other dirty clothes had lain in this mass for weeks, and not even this willing witness could positively recognize the matter mentioned as such male fluid, or swear that it might not have originated from other sources, or what it was or where it came from. No special examination was made to ascertain its character; it was not connected in any way with the defendant, or with his alleged activities with her daughter, and no court should commit an accused person to the penitentiary on such farfetched and flimsy evidence.

There is not a scintilla of evidence from any other source in support of the girl's charge against the defendant. No other witness states a single fact in support of the material evidence testified to by her. No other witness in this case states a single fact in support of the charges of the Malachoff woman. Neither the girl nor the mother support each other in a single material fact, on the main charge necessary to the conviction of the defendant.

There is no corroborating testimony anywhere in the record in support of Mrs. Malachoff's belated charge that defendant had once attempted to commit a rape on her person (P. 89, Tr.) She did not relate that doubtful, suspicious and prejudicial

story until long after she had persuaded the defendant to loan her and her husband the $850.00 mentioned in the evidence; nor until defendant had employed an attorney to secure repayment of principal, interest, or rentals, (P. 129, Tr.) nor until the charge had been made by her daughter, nor until it became necessary to bolster up the latter's weak story. She did not disclose that horrid attack upon her honor to her husband when it occurred, nor during the period when she and her husband were engaged in securing the loan, and attempting to persuade the defendant to assist them in their Sitka mining venture.

Upon the material facts necessary to convict the defendant under the charge in the idictment, the Malachoff girl, alone and without corroboration, made the statements of alleged facts. The defendant, unable to speak English, gaining his knowledge of the charge through an interpretor, denied the charges and the testimony of the girl quite as positively, and with such effect that the jury refused to convict on the girl's testimony, which they evidently disbelieved.

(b) THE JURY DISBELIEVED THE PROSECUTING WITNESS

The charge was statutory rape with her consent. If the girl told the truth that offense was consumated some time in May, a week after school adjourned on May 14th. (P. 13, Tr.) She testified that on 5 or 6 occasions thereafter she returned to his house and voluntarily consented to other completed acts of a similar nature. She testified to a complete crime of rape on each occasion, to penetra-

tion and consumation. She was calm, collected and clear in her statements, and if her testimony, under the circumstances, could be believed by the jury there was no doubt of the completion of the consumated crime of rape each time.

But the jury did not believe her evidence —they found the crime of rape had not been committed as sworn by her. But owing to the volubility of the hearsay evidence from two women, one of them a member of the Board of Childrens Guardians, the jury felt it incumbent upon them to do something. so they found him guilty of assault with intent,— that being the only other crime under the instructions of the court upon which they could find him guilty. Where the jury disbelieves a sole witness in the major and important part of her testimony, where she is cool, collected and positive, it ought not to be permitted to believe in the minor and less important part and to find a verdict of guilty thereon.

A case identical with this, in that respect, is State v. Mitchell, 54 Kan. 516; 38 Pac. 810, where the Supreme Court of Kansas said:

> "The prosecuting witness testified positively to the completed offense of rape, commited in the small space above described in this buggy box. The jury, notwithstanding her positive testimony, acquitted the defendant of the charge of rape, convicting him, however, of an attempt. In so doing they have found against the truth of her statements as to the principal fact testified to, while accepting her testimony as to minor matters. The explanation, and the

only explanation, offered by the state for this result, is that the jury must have regarded her statements as to the manner in which the offense was committed as incredible, and that they accepted so much as might have been true. The liberties of citizens ought not to be taken away, and severe punishment inflicted, on such testimony. The prosecuting witness knew, if she knew any fact connected with this matter, whether or not the main offense charged had been committed. If it had not, in fact, then she wickedly and corruptly sought to convict the defendant by perjury of that of which he was innocent, and she is utterly unworthy of belief. There is no other testimony in this case of any fact or circumstances, or of any act or declaration of the defendant, which is inconsistent with his entire innocence of any offense. The conviction, therefore, rests solely on the testimony of a witness whom the jury by their verdict have discredited and disbelieved as to the most important fact stated by her on the witness stand, and the fact concerning which, above all others, she could not possibly be mistaken. This court will not uphold a judgment resting for its only support on such a foundation."

State v. Mitchell, 54 Kan. 516; 38 Pac. 810.

In this case the jury did not believe the girl's major story, but compromised with its duty and defendant's rights, under the mistaken instruction of the court giving them that chance, and the hearsay evidence of the two women witnesses, one of whom

was frankly denunciatory of the crime, and both voluble in repeating the girl's story with emphasis.

(c) CONVICTION ON SIX DIFFERENT CRIMES PROVED

Another defect in, and insufficiency of, the evidence, and that the verdict was against the law, is established by this record in this: The indictment charged specifically that the statutory rape was committed on July 1st, 1921; the evidence of the girl was that the first consumated act was some time in May, a week after school closed on May 14. (P. 12, Tr.) She then testified positively that other completed acts occurred subsequently, and narrated the facts of the other crimes to the jury. (P. 20, Tr.) No election was required by the court of any specific act as the act to be submitted to the jury, no instruction limiting the attention of the jury to the act of July 1st, and no evidence showing specifically that either of the acts occurred on that day, or any other particular day was introduced.

As a matter of fact the court instructed the jury in paragraph V. of the instructions that the proof of rape must be of an act "at the time and place mentioned in the indictment"-to-wit, July 1st, 1921, but in the next paragraph, number VI, the instruction was changed and the court there said:

> "I instruct you that the exact date of the occurrence of the crime charged, if you find beyond a reasonable doubt that it did occur, is not necessary to be shown provided it is established beyond a reasonable doubt that it did occur within three years prior to the finding of the indictment in this case. By that I mean that

the prosecution is not obliged to prove that the crime was committed exactly on the first day of July, 1921, as laid in the indictment, but may prove the crime to have been committed any time within three years," etc.

Under these instructions, there being no election required of any date or act, the jury were free to choose different dates and different crimes, in arriving even at the verdict which they returned. In other words one juror may have based his verdict of assault with intent, on the act in May, another on another act on another date, and so on for the six different acts of rape testified to by the girl.

In an exactly similar case the Criminal Court of Appeals in Oklahoma reversed the verdict saying:

"In this state a person may be tried for and convicted of only one offense at a time. Rape is not continuous offense, and whilst in a prosecution for statutory rape proof of other acts of intercourse, occurring both prior to and subsequent to the one relied upon for a conviction, may be proved for the purpose of showing the intimate relations between the parties, etc., the conviction must be based solely upon one of such acts and not all of them, and it is error prejudical to the defendant, where no election of acts is required, to instruct the jury in effect that a conviction should result from proof beyond a reasonble doubt of any of such acts."

Smith v. State (Okla.) 201 Pac. 663.

Montour v. State 145 Pac. 811: 11 Okla, Cr. 376.

Sec. 2150 and 2153, Compiled Laws of Alaska, 1913, do not change this salutory rule. Section 2150 requires:

> "Sec. 2150. That the indictment must be direct and certain as it regards: First. The party charged; Second. The crime charged; and Third. The particular circumstances of the crime charged when they are necessary to constitute a complete crime."

And Section 2153 requires:

> "Sec. 2153. That the precise time at which the crime was committed need not be stated in the indictment, but it may be alleged to have been committed at any time before the finding thereof, and within the time in which an action may be commenced therefor, except where time is a material ingredient in the crime."

The general form of the indictment used in this case is prescribed by Section 2148, Comp. L. Alaska, 1913, where a specific date is required by the statute, and while it may be "the precise time at which the crime was committed need not be stated in the indictment, but it may be alleged," etc., still in this case, following the statutory form, *it was alleged, and was not proved;* there was, therefore a failure of sufficient evidence to make the case charged; the proof of other and different crimes at other and different times, further served to mislead the jurors and secure a verdict in a case where they had six different crimes to choose from to get one to their notion.

2. *The trial court erred in giving instruction number XI. to which proper objection was made and an exception allowed:*

Instruction XI was given in the following form:

"XI."

"A section of our statute provides that in all cases of criminal prosecutions the defendant may be found guilty of any crime the commission of which is necesarily included in that with which he is charged in the indictment or of an attempt to commit such a crime; and a further section provides that whoever assaults another with intent to kill or commit rape or robbery upon the person so assaulted, shall be imprisoned, etc."

"I charge you that the crime of assault with intent to commit rape is necessarily included in the crime of rape as charged in the indictment in this case, and if you, after a careful consideration of all the evidence produced before you under the instructions I have heretofore given you, conclude that the defendant is not guilty of the crime of rape as charged in the indictment, you should consider whether he is guilty of the crime of assault with intent to commit rape; and in this connection I charge you that where a female is capable of consenting under the law, there cannot be an assault to commit rape if she consents, but in a case where the female is under the age of consent—that is under the age of 16 years, the law steps in and says she is incapable of assent

—the law, in other words, resists for her." (P. 153, Tr.)

(a) ASSAULT WITH INTENT TO COMMIT RAPE

The indictment in this case was carefully drawn under the second clause in Section 1894, Compiled Laws of Alaska, 1913, which is as follows:

> "Sec. 1894. That whoever has carnal knowledge of a female person, forcibly and against her will, *or, being sixteen years of age, carnally knows and abuses a female person under sixteen years of age, with her consent, is guilty of rape.*"

The charging part of the indictment, under the last clause of Section 1894, above italicised, reads as follows:

> "The said Peter Sekinoff, at or near Juneau within the said District of Alaska, and within the jurisdiction of this court, on the first day of July, in the year of our Lord one thousand nine hundred and twenty one, did the said Peter Sekinoff, being then and there over the age of sixteen years, knowingly, wilfully, wrongfully, unlawfully, feloniously carnally know and abuse Sonia Malachoff, the said Sonia Malachoff being then and there a female person and then and there under the age of sixteen years, to-wit, of the age of eleven years, and the said Peter Sekinoff not being then and there the husband of said Sonia Malachoff."

A comparison of the law with the charging part of the indictment demonstrates that the pleader was careful to charge that the rape was statutory, merely, and "*with her consent*," as the statute pro-

vides, and as stated in her evidence. Under that statute and indictment was it error to instruct the jury, as was done in instruction numbered XI, herein, that "*assault with intent ot commit rape is necessarily included in the crime of rape as charged in the indictment in this case?*"

Counsel admits that such an instruction to an indictment drawn under the first part of Section 1894, supra, would be proper, for such an indictment must have alleged the rape was done "forcibly and against her will," but where the indictment charges, as in this case, that it was "with her consent," and the allegations of the indictment specially negative force or anything approaching it, or "an assault," the rule seems to be the other way.

True, the indictment in this case contains words charging that defendant did "*knowingly, wilfully, wrongfully, unlawfully, feloniously carnally* know and abuse Sonia Malachoff," but purposely avoids any reference to force or assault against her will.

The Statutes of Alaska provide, Compiled Laws, 1913:

> "Sec. 2150. That the indictment must be direct and certain as regards: First. The party charged; Second. The crime charged; and Third. The particular circumstances of the crime charged when they are necessary to constitute a complete crime."

Now the indictment in this case is direct and certain with regard to, first, the party charged, second, the crime charged, and, as defendant's counsel thinks, third, as to the particular circumstances of the crime charged, being necessary to constitute the

complete crime attempted to be charged. The fault is not with the indictment—it honestly states the fair purpose of the prosecuting attorney—the fault lies with the instruction which attempts to authorize the jury to find a verdict under a good indictment for an offense not included in it either by the law or the intent of the pleader.

The instruction informs the jury that assault with intent to commit rape is necessarily included in the crime of rape as charged. (*"and if you, after a careful consideration of all the evidence produced before you under the instructions I have heretofore given you, conclude that the defendant is not guilty of the crime of rape as charged in the indictment, you should consider whether he is guilty of the crime of assault with intent to commit rape, etc."*)

The jury did find the defendant not guilty of the crime of rape, even on the positive evidence of the girl that he was guilty of six consummated and complete offenses, because her testimony was so incredible as not to be believed—but upon the prejudice of the hearsay testimony of Mrs. Kashaveroff and Mrs. Malachoff's charges of another crime against her, and upon the error in the charge of the court, they found him guilty of an offense which the district attorney and the law did not intend to charge in that indictment.

The indictment in this case does not contain any statement "as to the particular circumstances of the crime charged where they are necessary to constitute a complete crime," of an included crime of "assault with intent to commit rape."

State v. Russell, 64 Kan. 798; 68 Pac. 615.

People v. Akin, (Cal.) 143 Pac. 795.

In the California case the court said:

"Defendant is charged with having had carnal intercourse with a female under the age of consent and he was convicted of "assault with intent to commit rape." Several reasons are urged by appellant for reversal, but the most serious question, which is not discussed or suggested at all, is whether the verdict is within the scope of the information, in other words whether the defendant was convicted of a different crime from that charged against him. (1) The charging part of the information is that:

"*The said Jack Akin did on or about the 12th day of May, A. D.* 1913, *at Butte County and State of California, and before the filing of this information, wrongfully, unlawfully, wilfully, and feloniously accomplished an act of sexual intercourse with one Nora Heckart, the said Nora Heckart being then and there a female under the age of sixteen years, to-wit, of the age of eleven years, and not being then and there the wife of the said Jack Akin.*"

"It is thus to be seen that the element of force is not charged, as indeed it is not required to constitute the offense of rape on the person of a female under the age of consent. The crime of assault with intent to commit rape necessarily implies, however, the use of force and violence, and negatives the idea of consent upon the part of the victim. Of course, if the defendant had been charged with rape on the

person of an adult, the element of force would have been included in the charge, and thus the information would have comprehended the crime of which he was convicted. Or, if the defendant had been convicted of an "attempt to commit rape," we could say that it was covered by the charge, because every crime includes an attempt to commit said crime. But "an assault implies repulsion, or at least want of consent on the part of the person assaulted." People v. Dong Pok Yip, 164 Cal. 146; 127 Pac. 1032."

The court further said of the principle involved in that and in this case:

"The same criticism might be made of the instruction given here, but in addition we think the verdict does not respond to the averments of the information. This is not a technical objection, but it goes to the fundamental right of the defendant to be formally charged with the crime of which he may be convicted."

And in the case of State v. Pickett, 11 Nev. 255; 21 Am. Rep. 754, cited in the Akin case, the opinion by Judge Beatty lays down the rule we think is applicable to the case at bar:

"By virtue of the provisions of sections 2464 and 2037, this defendant might have been convicted of an "attempt to commit rape," even if the child consented to all he did; but it was error to instruct the jury that he could be convicted of "asault with intent," etc, in that case. There can be no assault upon a consenting female, although there may be what the statute designates a rape."

That case was reversed for the error in giving an instruction similar to the one given in the Akin case, and almost identical with that given in the case at bar.

(b) AN ATTEMPT IS AN INCLUDED CRIME

In the first paragraph of instruction XI complained of, the trial court told the jury:

> "A section of our statute provides that in all cases of criminal prosecutions the defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the indictment *or of an attempt to commit such crime;" etc.*

The court then instructed the jury fully on the supposed included crime of "assault with intent to commit rape," but gave no instruction to the jury, whatever, on the included crime of attempt to commit the crime charged in the indictment. The court wholly withheld from the jury the included crime of attempt, and in the last instruction, Number XIV, told the jury (P. 156, Tr.):

> "I hand you three forms of verdict, 1. finding the defendant guilty as charged in the indictment; 2. finding the defendant guilty of assault with intent to commit rape; and, 3. not guilty."

The instruction number XI, on the subject of attempt was so clearly an error, from its want of statement, and by reason of the failure of the judge to submit it to the jury, that it seems to prove itself. This failure on the part of the court shows that he mistook the element of "assault" for that of "at-

tempt"—that he instructed them on assault instead of attempt through the hurry of the trial.

Sections 2073 and 2074, Compiled Laws of Alaska' 1913, provide for the punishment of attempts to commit crime in general provisions so attempt is an included offense under section 2269 to every substantive crime in the criminal code.

> "Sec. 2269. That in all cases the defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the indictment, *or of an attempt to commit such crime.*"

There may be substantive statutory crimes in the Alaska penal code which do not necessarily include another crime, except an attempt, but none can be found which does not include an attempt. For instance: Sec. 1894, under which the indictment in this case was drawn, states two separate substantive crimes,—rape, "*forcibly and against her will,*" and statutory rape on a female under sixteen, "*with her consent,*" the first of these substantive crimes contains four included crimes:—attempt, assault with intent, assault and battery and simply assault; the second substantive crime, rape "with her consent," contains only the single included crime of attempt. The court, however, instructed the jury, in effect, that both the first and second substantive crimes in the section necessarily included all the included crimes of both.

And right there is where the court erred:

(1) *Of course, an indictment may be found under Section* 1894 *for assault with intent to commit rape upon any female over or under* 16 *years of age, forc-*

ibly and against her will, but it must be found under the first clause of that section, and not under the second.

(2) *If an indictment is returned for rape on any female, whether over or under the age of sixteen years, forcibly and against her will, the substantive crime charged will necessarily include the lesser crimes of assault with intent to commit rape, assault and battery, simple assault, and attempt to commit rape.*

(3) *But where the substantive crime charged in the indictment is that of statutory rape, upon a girl under sixteen years of age, with her consent, as in this case, the only lesser crime necessarily included therein is attempt; the element expressed by the words "forcibly and against her will" is wholly excluded, purposely and by the plain language and logic of the law.*

(4) *Again, the indictment in this case was correctly drawn, upon the facts as the United States Attorney had them from the prosecuting witness, under the second clause of Section* 1894; *the error in the case was committed in giving an instruction which had no application to the second, but only to the first, clause of Section* 1894, *and to the substantive crime there charged, and refusing an instruction pointing out the error.*

The Supreme Court in a Kansas case said:

> "In a prosecution for statutory rape, where there was evidence tending to show no more than an attempt, it was held to be the duty of the court to instruct the jury as to the law of attempt to commit the offense, *although the*

defendant had not asked for such an instruction."

State v. Grubb, 55 Kan. 678; 41 Pac. 951.

State v. Langston, 106 Kan. 672; 189 Pac. 153.

(c) LESSER CRIMES INCLUDED IN THAT OF ASSAULT WITH INTENT

Even if it be conceded the court correctly gave the instruction upon assault with intent to commit rape, the court erred in failing and refusing to give an instruction to the jury on the lesser degrees of crime included in that crime. Assault and battery and simple assault are made crimes in Alaska by the provisions of section 1905, Compiled Laws of Alaska, 1913, and both are clearly included in and are lesser degrees of the crime of assault with intent to commit rape or any other substantive crime based upon an attack on the person. Of course both assault and assault and battery are necessarily included in a charge,—

> "Sec. 1898. That whoever assaults another with intent to kill, or to commit rape or robbery upon the person so assaulted, shall be imprisoned," etc.

When the court instructed the jury they might find the defendant guilty of assault with intent to commit rape under the above section, they should also have been instructed under the statutory rule that they might find him guilty of lesser and included crimes in that offense, for section 2252 of the Alaska Code of Criminal procedure declares:

> "Sec. 2252. That when it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two

or more degrees he is guilty, he can be convicted of the lowest of those degrees only."

And no such instruction was given in this case, neither in XI or XIII, complained of, or at all, and the giving of those instructions, in the manner in which they were given, is equivalent to a refusal to give correct instructions.

And in Arizona:

"(7) The court in its instructions should declare fully the law upon every degree of homicide of which the accused could be convicted, which is supported by evidence. State v. Baker, 13 Mont. 160; 32 Pac. 647; 2 Cyc. 1065, notes 39, 40 and 41, and Id., 1063, note 26."

"It is the duty of the trial court to clearly define the grades of the offense included in the indictment of which the accused, under the evidence, may be convicted. Under the indictment and the evidence in this case, the accused could have been convicted of any degree of homicide, or acquited. * * * * The court gave no instructions presenting the phases of the testimony applicable to voluntary manslaughter, excusable homicide, justifiable homicide, nor inevitable accident or misfortune; nor did the court instruct the jury upon the phase of the case presented assuming the arrest or attempted arrest to have been unlawful and without legal authority; and, in the absence of such instruction, we deem substantial rights have been denied appellant from which we presume he has suffered material injury."

"For which errors in the instructions as

given and the failure of the court to instruct as intimated above, the judgment of the trial court is reversed," etc.

Stokes v. Territory, 14 Ariz. 242; 127 Pac. 742.

An identical case with the one at bar is that of People v. Watson, 125 Cal. 342; 57 Pac. 1071, where the Supreme Court of California said:

"This defendant's position upon the matter under discussion is much stronger than we find in those cases where the court fails to instruct at all upon the question. In some of those cases it has been held that the defendant should have asked for an instruction directed to the particular point. But in the present case the giving of the instructions we have quoted is, in substance, the equivalent of a refusal to give an instruction authorizing the jury to find a verdict of guilty against the defendant under the aforesaid sections of the Penal Code, provided the evidence justified it. * * * * The trial judge, of his own motion, should inform the jury in every case as to all the particular crimes involved in the information which the evidence to any extent tends to support. Such is a most commendable practice; but here we are not concerned in that matter, for we have a case much stronger than one where the court did not act at all. It is not a case on non-action, but erroneous action. For the foregoing reasons, the judgment and order are reversed," etc.

People v. Watson, 125 Cal. 342; 57 Pac. 1071.

Musgrave v. Territory, 12 Ariz. 123; 100 Pac. 440.

State v. Frazier, 50 Kan. 87; 36 Pac. 58.

Territory v. Nichols, 3 N. M. 103; 2 Pac. 78.

In State v. Vinsant, 49 Iowa 241, which was a prosecution for rape, the court says:

> "Whoever is charged with the crime of rape is charged with all that constitutes it, and one of the elements of rape is an assault."

And the judgment in that case was reversed because the jury was not directed to find the accused guilty of a simple assault in case the evidence warranted such a verdict. See, also, Comm. v. Drum, 19 Pick. 480. And in a note to section 2494, Thomp. Trials, it is said that the court ought not to so instruct the jury as to take from them the right of determining the grade of the crime of which the accused stands charged; citing Vollmer v. State, 24 Neb. 838; 40 N. W. 421, Adams v. State 29 Ohio St. 412, and Shaffner v. Comm. 72 Pa. St. 60.

3. *The trial court erred in giving instruction number XIII. to which objection was made and an exception was allowed.*

Paragraph XIII of the instructions in this case is subject to the objections made to paragraph XI in the foregoing pages of the brief, but it is also open to the further objection that it is a distinct refusal on the part of the court to instruct the jury in relation to attempt, and to the lesser degrees of asault. It also peremptorily withdraws from the jury the power to judge of the facts in relation to such attempt and included crimes.

The true rule in such cases is that if there is any testimony in support of such inferior degrees or included crimes it is the duty of the court to submit the

matter to the determination of the jury under proper instructions.

Stevenson v. U. S. 162 U. S. 313; 40 L. Ed. 980.

Wallace v. U. S. 162 U. S. 466; 40 L. Ed. 1039.

Sparf v. U. S. 156 U. S. 51; 39 L. Ed. 343.

But where there is no evidence before the jury in support of any included crime or lesser degree the jury must either convict or acquit on the crime charged.

Sparf v. U. S. 156 U. S. 51 (106); 39 L. Ed. 343 (362).

Anderson v. U. S. 170 U. S. 510 (511): 42 L. Ed. 1126.

Davis v. U. S. 165 U. S. 379; 41 L. Ed. 754.

Thorwegan v. King, 111 U. S. 549; 28 L. Ed. 514.

That the lower court believed there was evidence of the commission of an inferior degree or of included crimes in the case at bar is shown conclusively by the instructions XI and XIII given by the court. Both the court and the jury heard the prosecuting witness testify positively to the commission of six completed and consummated acts of rape upon her body, with her consent, and heard her detail the circumstances in connection with each, but did not believe her story. They still gave her untruthful statements credence by submitting the lesser degree of assault with intent to commit rape to the jury, while excluding attempts and the lesser degrees of assault.

Now it seems logical and within the rules laid down by the courts of highest character that the defendant in this case was either (1) Guilty as charged

in the indictment, or (2) guilty of attempt, or (3) not guilty. But the court below concluded there was doubt of his guilt as charged, and chose to submit one of the supposed inferior grades of included crime to the jury instead of all, and thereby committed error.

4. *Court refused to give fundamental instructions.*

Sec. 2246. Compiled Laws of Alaska, 1913, provides the orderly procedure in the trial of criminal cases, and in the first paragraph orders that "when the evidence is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by the court; which instructions shall be reduced to writing if either party requests it."

The seventh paragraph of the section provides:

> "Seventh. The court, after the argument is concluded, shall immediately and before proceeding with other business charge the jury; which charge, or any charge given after the conclusion of the argument, shall be reduced to writing by the court, if either party requests it before the argument of the trial is commenced; such charge or charges, or any charge or instructions provided for in this section, when so written and given, shall in no case be orally qualified, modified, or in no manner explained to the jury by the court; all written charges and instructions shall be taken by the jury in their retirement, and returned with their verdict into court and shall remain on file with papers of the case."

Section 2266, Comp. Laws of Alaska, 1913, provides:

"Sec. 2266. That although the jury have the power to find a general verdict, which includes questions of law as well as fact, they are bound, nevertheless, to receive as law what is laid down as such by the court:" etc.

Under the statutes in force in Alaska, then, it is the duty of the court to instruct the jury on the law of the case, and it is the duty of the jury "to receive as law what is laid down as such by the court." While a defendant may request special instructions under the fifth paragrph of section 2246, supra. he is not obliged to do so, and if he request it, the seventh paragraph of that section makes it the statutory duty of the judge to charge the jury in writing, fully and upon the issue presented to the jury within the indictment, and the evidence presented to the jury. The judges duty is only limited by the issue of law presented in the indictment, and the evidence admitted by him to the jury.

> "It is the duty of the court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and respecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside

a verdict which is unsupported by evidence or contrary to law."

Pleasants v. Fant. 89 U. S. 116; 22 L. Ed. 780.

Texas & P. Ry Co. v. Rhodes, 71 Fed. 145 (148)

Ulman v. Clark, 100 Fed. 180 (195).

In a case coming from Alaska the Supreme Court of the United States said upon the general duty of the trial court in matters of instruction to the jury:

"It is well settled that the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal. The numerous decisions to this effect are cited in Wharton on Criminal Law, Vol. 3 Par. 3162, 7th Edition. The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved.

"It has sometimes been said that if the judge omits something, and is not asked to supply the defect, the party who remained voluntarily silent cannot complain. But such a principal cannot apply to the present case, because the judge's attention was directly called by the government's request to the question of self defense, and because the defect in that request was then and there pointed out by the defendant's counsel in their exception. The defendant as shown in the bill of exceptions,

had testified to his own belief that his life was in danger, and to the facts that led him so to believe; but by the instruction given the jury were left to pass upon the vital question without reference to the defendant's evidence."

Bird. v. U. S. 180 U. S. 356; 45 L. Ed. 570 (573.)

And, similarly, the attention of the trial judge was directed to the matter of instructing upon lesser and included crimes and attempts, for in his first paragraph in instruction XI he distinctly states that fact—and yet left the jury to pass upon vital questions stated by himself therein without reference either to the evidence or without necessary instructions for their guidance.

In the case of Coffin v. U. S. 156 U. S. 432; 39 L. Ed. 481, the Supreme Court discussed the error of the trial court in refusing to instruct the jury upon the presumption of innocence, and said:

"The authorities upon this question are few and unsatisfactory. In Texas it has been held that it is the duty of the court to state the presumption of innocence along with the doctrine of reasonable doubt, even though no request be made to do so. Black v. State, 1 Tex. App. 369; Priesmuth v. State, 1 Tex. App. 480; McMullen v. State, 5 Tex. App. 577. *It is doubtful, however, whether the rulings in these cases were not based upon the terms of a Texas statute, and not on the general law.*"

The rule in California is thus stated:

"*It is the duty of a court in criminal cases*

to give, sua sponte, where they are not proposed or presented in writing by the parties themselves, instructions on the general principles of law pertinent to such cases; but it is not its duty to give instructions on specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them. This rule is so well settled that authorities need not be cited herein in support of the statement thereof."

People v. Peck,———Cal. App.———; 185 Pac. 881.

And in Oklahoma:

"Instructions not objected to in the trial court, nor called to the attention of the trial court on the motion for a new trial, will not be considered on appeal unless *fundamentally erroneous."*

Williams v. State,———Okla. Cr. ———; 191 Pac. 744.

Russell v. State,———Okla. Cr.———; 194 Pac. 242.

Ford v. State, 5 Okla. Cr. 241; 114 Pac. 274.

Birdwell v. U. S. 10 Okla. Cr. 159; 135 Pac. 445.

And in Nebraska:

"It is well settled in this state that it is the duty of the trial judge, particularly in criminal action, to instruct the jury as to the rules of law governing the disposition of the cause, whethed he is requested to do so or not; and if

the charge to the jury, by ommission to instruct on certain points, in effect withdraws from the consideration of the jury an essential issue of the case, it is erroneous. Pjarrou v. State, 47 Neb. 294; 66 N. W. 422; Dolan v. State, 44 Neb. 643; 62 N. W. 1090; Long v. State, 23 Neb. 33; 36 N. W. 310."

Young v. State —— Neb. —— ; 104 N. W. 867.

It is the duty of the court to instruct the jury on the issues presented by the indictment and evidence admitted thereon without request.

Brickwood-Sacketts Inst. Vol. 1, Secs. 155, 157.
Owen v. Owen, 22 Iowa, 270.
State v. Brainerd, 25 Iowa, 572.
Upton v. Paxton, 72 Iowa 299; 33 N. W. 777.
Barton v. Gray 57 Mich. 622.
People v. Murray, 40 N. W. 29. (Mich.)
Warton's Crim. P. & P. 9th Ed. Sec. 709, 793.
Lang v. State, 1 S. W. (Tenn.) 319.

5. *Court failed to give statutory instructions.*

Sec. 2246, Compiled Laws of Alaska, 1913, requires the court to give the charge—the instructions —to the jury (and when requested) in writing.

In addition to this general requirement other sections of the criminal statutes require the court to give certain fundamental instructions in criminal cases, some of which were given in this case, and others of which were not. Among those statutory requirements are the following:

"Section 2252. That when it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two

or more degrees he is guilty, he can be convict- of the lowest of those degrees only."

Now that section requires the court to instruct on the degrees of crime included in the substantive crime charged in the indictment and the lesser degrees thereof, and to instruct the jury specifically as stated in the statute, that if there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only. No such differentiation of the degrees was made, with respect to attempt, or with respect to assault and battery and assault in the crime which the court did submit, and by reason of this refusal to give the statutory instructions there was error.

The next statutory command was the following:

> "Section 2262. That a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission.'

Section 1505 also provides that the jury shall "be instructed by the court on all proper occasions: * * * * Fourth. That the testimony of an accomplice ought to be viewed with distrust and the oral admissions of a party with caution."

These statutory provisions were adopted from Oregon where that Supreme Court holds:

> "One who admits participation in adultery

is an accomplice."

State v. Scott, 28 Ore. 331; 42 Pac. 1.

or in incest,—and rape,—

State v. Jarvis, 18 Ore. 360; 23 Pac. 251.

or fornication, (citing People v. Jenness, 5 Mich 321.)

State v. Jarvis, 20 Ore. 437; 26 Pac. 302.

> "In the case before us the defendant accomplished his purpose, either by the consent of the prosecutrix or by force,—if by her assent, she was an accomplice, and a conviction could not be had on her uncorroborated testimony," etc.

State v. Jarvis, 20 Ore. 437, supra.

Where a girl is old enough and knowing enough to consent and does consent to have six acts of connection with a man at different times and hides the fact from her protectors she is within the evil which the law intends to prohibit by the sections above quoted, and the court erred in not giving such instruction of its own motion. In this case the judge gave the jury a cautionary instruction (IX) but failed and refused to give the instruction commanded by the statute, whereby there was error.

A similar section, intended to protect a defendant in such cases from the injustice so fairly pointed out by the court in his instruction number V in this case, is section 2264 of the compiled Laws of Alaska, 1913. (Italics mine.)

> "2264. That upon the trial for inveigling, enticing, or taking away an unmarried female for the purposes of prostitution, *or having se-*

duced and had illicit connection with an unmarried female, the defendant cannot be convicted upon the testimony of the female injured, unless she is corroborated by some other evidence tending to connect the defendant with the commission of the crime."

Two other sections of our code of criminal procedure are as follows, (Italics mine):

"Sec. 2268. That upon an indictment for a crime consisting of different degrees,*the jury may find the defendant not guilty of the crime charged in the indictment and guilty of any degree inferior thereto, or of an attempt to commit the crime or any such inferior degree thereof.*"

And (Italics mine):

"Sec. 2269. *That in all cases the defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit such crime.*"

In this case the crime charged in the indictment is statutory rape, "with her consent," and the only included crime is that of *attempt.* The jury refused to convict of the crime charged, but under the instructions of the court found the defendant "guilty of assault with intent to commit rape." Included in that are three included crimes, viz. Assault and battery, assault, and attempt.

Notwithstanding the positive commands of the statute the court failed and refused to instruct the jury on either of these included crimes or attempt,

and thereby caused fundamental harm to the defendant.

6. *No assignments of errors made.*

There may not be found in this record any request for instructions on the elements complained of in the last above paragraph, nor any assignments based thereon, but the rule of this court provides (Rule 11): "but the court, at its option, may notice a plain error not assigned." And also rule 24, paragraph 4 provides "but the court, at its option, may notice a plain error not assigned or specified."

A similar provision is found in paragraph 4, Rule 21, of the Supreme Court of the United States.

> "An appeal will not be dismissed for want of an assignment of errors, as the court, under rule 21, paragraph 4, may, at its option, notice a plain error not assigned."
>
> U. S. v. Penn. 175 U. S. 500; 44 L. Ed. 251.
>
> School Dist. v. Hall, 106 U. S. 428; 27 L. Ed. 237.

In a recent case in the 8th Circuit the court said (Italics mine):

> "*No exception was saved to this additional charge, but we have considered the objections urged against it because the liberties of citizens are involved.*"
>
> Lucas-Hicks v. U. S. 275 Fed. 405.

Upon the foregoing instructions and statements of counsel for the plaintiff in error we think the verdict of the jury ought to be reversed and the defend-

ant below discharged, because; first, there was no evidence, and can be none, that the jury or any body else ought to believe, to connect him with the commission of the crime charged in the indictment, or any attempt to commit such crime; second, because of the many fundamental errors in charging the jury and; third, in the failure of the court below to grant the defendant a new trial.

JAMES WICKERSHAM
J. W. KEHOE,
Attorneys for Plaintiff in Error.

No. 3808

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PETER SEKINOFF,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

A. G. SHOUP,

United States Attorney, First Division, District of Alaska, for Defendant in Error.

Neal, Stratford & Kerr, S. F. 20070

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BRIEF OF DEFENDANT IN ERROR

STATEMENT OF THE CASE.

An indictment was returned against the plaintiff in error at Juneau, Alaska, on October 11, 1921, charging that

> "The said Peter Sekinoff, at or near Juneau, within the said District of Alaska, and within the jurisdiction of this Court, on the first day of July, in the year of our Lord one thousand nine hundred and twenty-one, did, the said Peter Sekinoff being then and there over the age of sixteen years, knowingly, wilfully, wrongfully, unlawfully, feloniously carnally know and abuse Sonia Malachoff, the said Sonia Malachoff being

then and there a female person and then and there under the age of sixteen years; to-wit, of the age of eleven years, and the said Peter Sekinoff not being then and there the husband of said Sonia Malachoff."

Said indictment was brought under Sec. 1894, Compiled Laws of Alaska, 1913, which section reads as follows:

"Sec. 1894. That whoever has carnal knowledge of a female person, forcibly and against her will; or, *being sixteen years of age, carnally knows and abuses a female person under sixteen years of age, with her consent, is guilty of rape.*"

Section 1895, Compiled Laws of Alaska, reads as follows:

"Sec. 1895. That a person convicted of rape upon his daughter, or sister, *or a female person under twelve years of age, shall be imprisoned in the penitentiary during life;* and a person convicted of rape upon any other female person shall be imprisoned in the penitentiary not more than twenty years nor less than three years."

Section 2269, Compiled Laws of Alaska, reads as follows:

"Sec. 2269. That in all cases the defendant may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit such crime."

Section 1898, Compiled Laws of Alaska, reads as follows:

> "Sec. 1898. That whoever assaults another with intent to kill, *or to commit rape* or robbery upon the person so assaulted, shall be imprisoned in the penitentiary not more than twenty years nor less than one year."

The evidence in the case shows the plaintiff in error (defendant in Court below) is a Russian, from the Black Sea region, who has been in the United States for many years (Transcript page 113); that his victim was at the time of the commission of the crime but eleven years old (Transcript p. 5); that her father is a hard-working, respectable native of Alaska, of Russian extraction, who had met with a series of misfortunes (Transcript pp. 80-81); that her mother had been ill and is a person of violent temper and feared by her children (Transcript pp. 74-78), but of good moral character, so far as this record reveals; that said Malachoff family consisted of the parents and seven children, including the eleven-year-old girl, Sonia.

The evidence further shows that the plaintiff in error became acquainted with said Malachoff family some time in the fall of the year 1920; that he almost immediately began ingratiating himself with said Malachoff family by offering them financial assistance; by offering to set the father, S. M. Malachoff, up in the mercantile business; by offering to assist him in developing his mining claim; by offering to take him into partnership on a wood-cutting contract, and in other ways; that said S. M. Malachoff

and his wife finally did borrow $500 from plaintiff in error (Transcript pp. 86 and 45). The evidence further shows that during all of his acquaintanceship with the Malachoff family the plaintiff in error was particularly attentive to the said Sonia Malachoff; that he gave her presents, took her for walks and a trip to Treadwell, entertained her by taking her to cafes for meals, and contrived upon various pretexts to have her visit him at his cabin; that he persistently tried to get the girl away from her parents and into his custody, by offering to take her away to school, insisting upon her going to the woods with him on the wood-cutting trip, and in other ways, as the evidence shows.

Sonia Malachoff, the victim of this assault, told a simple, straightforward, convincing story. She told how the plaintiff in error would arrange for her to visit his cabin upon one excuse or another; how, if she were accompanied by her younger sister, the plaintiff in error would give the younger sister money and send her away to buy candy; how plaintiff in error would then take Sonia upon his lap and kiss her, feel of her body; how he would take out his penis and have her hold it; and how finally, on or about the 21st day of May, 1921, plaintiff in error got the mother's permission for Sonia to visit his cabin for the purpose of writing a letter for him; how he sent the younger sister away for candy, locked his door and then took Sonia on his lap and had her handle his privates. She described how he

laid her upon his bed, unfastened her clothing and proceeded to accomplish his purpose. She testified that he penetrated her body about one inch; that she cried from the pain, and that plaintiff in error put his hand over her mouth; that there was an emission of "something like hot water" from his body to hers. Whether there was an actual coition or whether the emission was caused by his passionate excitement, superinduced by her preliminary handling of his privates, was a question of fact for the jury to determine.

The girl Sonia then went on to explain how plaintiff in error wiped her off with a handkerchief and impressed her with the idea that it would be dangerous for her to tell her mother of what had happened. Sonia then told how plaintiff in error, on five subsequent occasions, attempted to have intercourse with her, but desisted each time when she cried.

This story is corroborated by the testimony of Mrs. A. P. Kashevaroff, President of the Board of Children's Guardians. The testimony of Mrs. Kashevaroff (Transcript, pp. 75 et seq.) is to the effect that she had observed an intimacy between plaintiff in error and the girl Sonia Malachoff; that when the girl went to Mrs. Kashevaroff's house on an errand, she took advantage of the opportunity to question her as to what had occurred between her and plaintiff in error. By rigid questions (Transcript, p. 76), she drew a confession from the girl that plaintiff in error had been in the habit of taking

the girl upon his lap and kissing her, feeling her person and putting her upon his bed and handling her body.

The evidence is that during the times when the assault was made in May, 1921, Sonia's mother was sick in the hospital and her father was away from home during the day, engaged in work. Mrs. Kashevaroff testified that she did not tell Mrs. Malachoff what Sonia had told her because Mrs. Malachoff was sick, but she did tell the husband, Mr. Malachoff, who testified that he did not mention the matter to his wife because of her physical condition. (Transcript, p. 42.)

Mrs. Malachoff testified that during the time she was confined to her bed with sickness, there had been an accumulation of soiled clothing of the children. Then when she got on her feet sometime in July (Transcript, p. 85) she examined this pile of soiled clothing, with a view to washing it, and, upon inspection of a union suit belonging to Sonia she found the garment stained with "blood and that yellow stuff that comes from a man." (Transcript, p. 86.)

Mrs. Malachoff then went on to testify, without objection by plaintiff in error or his attorney, that she asked Sonia if any man had been intimate with her and, if so, what man; that Sonia acknowledged what had happened to her and said plaintiff in error had done it. Then, after telling her husband what had happened, she took the girl and went to the house of plaintiff in error and asked him if what

Sonia had told her was true. Plaintiff in error denied that he had raped the girl, but he did say (Transcript, p. 87): "Well, maybe I was touching her and feeling her, and I didn't hurt her." Then, in the presence of plaintiff in error, Mrs. Malachoff said to Sonia, "Tell me how he did it to you," and Sonia laid down across the bed to show how he did it, and he took hold of her and said, "Don't show it to mamma; mamma's too weak; she might get sick." Then she told plaintiff in error that she was going to report him to the court and he threatened that if she reported him he would kill her and all of her family when he got out of jail.

Within a few hours, plaintiff in error sent an attorney to demand of the Malachoffs that they pay him the money he had loaned to them.

All of the evidence of Mrs. Kashevaroff and Mrs. Malachoff was corroborative of the evidence of Sonia Malachoff, was material and was not objected to by plaintiff in error or his attorney. The admissions of plaintiff in error to Mrs. Malachoff were particularly material.

ARGUMENT.

Counsel for plaintiff in error sets up as his first specification of error:

> "Insufficiency of the evidence to justify the verdict and that the verdict is against the law."

In support of that specification, he contends that the only witness connecting the plaintiff in error

with the crime charged is the prosecuting witness, Sonia Malachoff, and that the jury "utterly failed to accept her story as true."

In the first place, the testimony of both S. M. Malachoff and Mrs. S. M. Malachoff connects the plaintiff in error with the crime charged. They testified to his repeated efforts to get the girl away from her parents and into his custody, of his taking her to a photographer and having her picture taken with him, and of his taking her on his lap and kissing her. All showing his lascivious disposition toward the prosecuting witness.

The testimony of Sonia Malachoff, as hereinbefore stated, left abundant room for a reasonable doubt as to whether or not plaintiff in error actually had coition with her on or about the 21st day of May, or assaulted her with that intent. If any reasonable doubt existed in the minds of the jury as to whether the defendant was guilty of the crime charged, or of a lesser degree, or of an included crime, it was their duty to resolve the doubt in favor of the defendant and find him guilty of the lesser degree or included crime.

It is urged that the prosecuting witness, Sonia Malachoff, testified that the defendant had made six subsequent and separate criminal assaults upon her. The Court properly instructed the jury in his Instruction No. IX (Transcript, p. 152) that "this evidence was received only as in a way corroborative of

the testimony of the girl as to the act charged and as being one of the circumstances surrounding the case and to assist you in determining the probability or improbability of her statements in regard to the crime charged, and for no other purpose, and you should not regard or consider such evidence for any purpose other than that for which it was admitted."

Counsel for plaintiff in error strongly urges as his principal ground that the verdict in this case is against the law; that the crime of assault with intent to commit rape is not an included crime under this indictment, to-wit: statutory rape, upon a female under sixteen years of age.

Section 1894, *supra,* defining the crime of statutory rape, and Section 1898, *supra,* defining the crime of assault with intent to commit rape, are a part of one Act of Congress, viz: the Criminal Code of Alaska, approved March 3, 1899. These two sections were borrowed bodily from the Oregon code.

The doctrine that assault with intent to commit rape is an included crime, under the Oregon statutes, in an indictment for statutory rape, is well stated and settled in the Oregon case of *State v. Sargent* (49 Pac. 889). Judge Wolverton, in passing upon this point and commenting upon the identical statutes under which the verdict in the case at bar was found, said:

> "We will notice but one other assignment, as the case must go back, and the other questions

urged here are not likely to arise upon a retrial. It is strenuously urged by the counsel for the defendant that there can be no assault with intent to commit rape where the female consents, even though she be under the age of 16 years. The statutory crime of rape is thus defined: 'If any person over the age of sixteen years shall carnally know any female child under the age of sixteen years, or any person shall forcibly ravish any female such person shall be deemed guilty of rape.' Section 1733, Hill's Ann. Laws Ore., as amended (see Sess. Laws 1895, p. 67). Section 1740, Hill's Ann. Laws Ore., provides for the punishment of any person found guilty of an assault with intent to commit a rape. It is the theory of counsel that these sections of the statute do not fix the age of consent, except as it pertains to carnal knowledge; in other words, that if the act of carnal knowledge has been consummated with the consent of a female under the age of 16 years, it would make no difference whether she consented or not, the crime of rape would nevertheless be the result of such coition; but not so with an assault with intent to commit the crime, as the statute has not fixed the age of consent with reference to that offense. In this we cannot concur. It is rape for a person above the age of 16 years to carnally know any female child under that age, and this without the use of force. Now, when the legislature established the additional crime of assault with intent to commit a rape, it evidently had in view the crime of rape as defined by the original section 1733, of which the present is amendatory. In fact, both sections were enacted at one and the

same time, and should, under a well-settled rule, be interpreted in *pari materia*. Hence the word 'rape,' as used in the latter section, must be deemed to have been used in the sense in which it is defined by the former, and it must be taken as if its definition is read into the latter section. In this view of the matter there is no difficulty in reaching the conclusion that non-consent of a female child under the age of 16 years when assaulted by a person above that age with intent to commit a rape is no more an essential or an ingredient of the one crime than the other. One involves the completed act, the other the intent to consummate such a purpose; and if consent is immaterial upon a charge of committing the completed act, which necessarily includes an assault, no reason exists why it should not be so upon a charge of an assault with intent to accomplish the same purpose. Com. v. Roosnell (Mass.), 8 N. E. 747. The law has determined that a female child under the age denominated is incapable of consenting. It is as though she had no mind upon the subject, no volition pertaining to it. There is a period in child life when in reality it is incapable of consenting, and the legislature has simply fixed a time, arbitrarily, as it may be, but nevertheless wisely, when a girl may be considered to have arrived at an age of sufficient discretion, and fully competent to give her consent to an act which is a palpable wrong, both in morals and in law. Under these conditions, while a girl may give her formal and apparent consent, yet in law she gives none. The evidence of such consent is withheld, and rendered wholly incompetent for

> the establishment of such a fact, as in law the fact itself does not exist. Looking at the question in this light, it is easy to comprehend the legal and logical conclusion that an assault with an intent to commit a rape is as much without the consent of a girl under the age of 16 years, although she formally yields concurrence, as that the commission of rape is without her consent under like circumstances. This conclusion is supported by many cases, and we believe it to be the better doctrine, although some authorities are to be found on the contrary. (Citing authorities.)

Also, see:

State v. Blythe, 58 Pac. 1108;
Boyd v. State of Georgia, 74 Georgia Reports 356;
People v. Abbott, 37 Am. St. Rep. 360;
Campbell v. People, 34 Mich. Rep. 351;
People v. McDonald, 9 Mich. 149;
State v. Cross, 79 Am. Dec. 518;
Glover v. Commonwealth, 10 S. E. 420;
Hutto v. State, 53 So. 809;
Burton v. State, 62 So. 394.

A decided weight of the authorities is to the effect that an indictment alleging statutory rape without alleging force is sufficient to sustain a verdict of assault with intent to commit rape upon a consenting female under the age of consent, consent or want of consent being immaterial, the law resists for her. Assault with intent to commit rape is necessarily included in statutory rape. There could be no crime under the statute without an assault.

In the very well considered case of *Walters v. United States* (222 Fed. 892) this Court held:

> "It is the rule established by the decided preponderance of the authorities and by sound reason that in the case of an assault to commit rape upon a female under the age of consent it is not necessary to prove want of consent, for the reason that in law she cannot consent to such an assault. Cyc., 1434; Bishop's New Criminal Law, par. 1120; State v. Sargent, 32 Or. 110, 49 Pac. 889; People v. Roach, 129 Cal. 33, 61 Pac. 574; State v. Johnson, 133 Iowa 38, 110 N. W. 170; Commonwealth v. Roosnell, 143 Mass. 32, 8 N. E. 747; Liebscher v. State, 69 Neb. 395, 95 N. W. 870, 5 Ann. Cas. 351."

> "One who attempts to have intercourse with a female under the age of consent is guilty of an attempt to rape notwithstanding her actual consent. It has also been held in most jurisdictions that there may be an assault with intent to rape upon a consenting female where she is under the age of consent, on the ground that in law she cannot consent to such an assault." (33 Cyc., 1434.)

Lee v. State, 122 Pac. 1111-1114 (citing Cyc.);
Sanders v. State, 112 S. W. 938;
Hightower v. State, 143 S. W. 1168;
Fowler v. State, 148 S. W. 576;
Callaghan v. State, 155 Pac. 308;
DeLeon v. State, 187 S. W. 485;

> "An assault usually implies force by the assailant and resistance by the assailed. If, however, the latter is made incapable of consent, the

act may constitute an assault although she did not resist, but, on the contrary, assented." (22 R. C. L., 1232.)

"Where a connection with a female child under the age of consent is considered as rape, it is almost universally held that an attempt to have such connection is an assault with intent to commit rape, the consent of the child being wholly immaterial." (22 R. C. L., 1233.)

People v. Verdegreen, 39 Pac. 607.
Commonwealth v. Murphy, 42 N. E. 504;
Liebscher v. State, 95 N. W. 870.
State v. Fugita, 129 N. W. 360;
Taylor v. State, 97 S. W. 94.

Continuing, 22 R. C. L., Sec. 71, page 1233:

"The consent of such an infant being void as to the principal crime, it is equally so in respect to the incipient advances of the offender."

State v. Pickett, 11 Nev. 255, 21 Am. Rep. 754 (stating reasons but holding otherwise). This case is quoted by appellant.

In the case of *State v. Pickett,* 11 Nev. 255, 21 Am. Rep. 754, cited by appellant in the case at bar, and cited and approved in *State v. Aken* (cited by appellant), 143 Pac. 795, the Court states reasons contrary to appellant's proposition, but decides otherwise. The Court in *State v. Pickett* says:

"Thus in the case of Hays v. The People, 1 Hill 352, where the precise question here involved was under discussion, Judge Cowen, de-

livering the opinion of the court said: 'The assent of such an infant being void as to the principal crime, it is equally so in respect to the incipient advances of the offender. That the infant assented to or even aided in the prisoner's attempt, cannot, therefore, as in the case of an adult, be alleged in his favor any more than if he had consummated his purpose.' "

In R. C. L., page 1233, Sec. 71, *supra,* the authors say:

> "There are, however, decisions to the effect that an attempt to commit rape can never constitute an assault when the female actually consents to what is done, whether she is within the age of consent or not"—

and cites *State v. Pickett, supra,* and *Smith v. State,* 12 Ohio St. 466, 80 Am. Dec. 355. The latter Ohio case is cited in *State v. Pickett, supra.* Continuing, the authors of R. C. L. say:

> "These cases were decided on the authority of English cases which hold that in a prosecution for an assault with intent to have carnal knowledge of a girl under the age of consent, it is a good defense that the girl consented."

However, the authors of R. C. L. further say, in the same paragraph:

> "Where a connection with a female child under the age of consent is considered as rape, it is almost universally held that an attempt to have such connection *is an assault with intent to commit rape, the consent of the child being wholly immaterial."* (Citing authorities.)

So that a comparison of authorities conclusively shows that the conclusion reached in *People v. Aken*, 143 Pac. 795, and *State v. Pickett*, 11 Nev. 255, 21 Am. Rep. 754 (stating reasons but deciding otherwise) cited by appellant are decidedly against the weight of authority.

> "One charged with the crime of rape by having sexual or carnal knowledge of a female child under the age of 14 years may if the evidence authorizes, be convicted of the offense of ASSAULT WITH INTENT TO RAPE. The girl alleged to have been raped in this case being 13 years of age, and the evidence only authorizing and the state only asking a conviction of assault with intent to rape, it was not error for the court to give in charge to the jury the act of the Legislature (Georgia Laws 1918, p. 259) which fixes the age at which female children may consent to acts of sexual intercourse. THE CRIME OF ASSAULT WITH INTENT TO RAPE is committed when a man undertakes to have sexual intercourse with an unmarried female child under the age of 14 years, by attempting to insert his private parts into her private parts, and where penetration of the vagina is not made only because force sufficient is not used, EVEN THOUGH THE CHILD MAY HAVE CONSENTED TO THE ATTEMPTED SEXUAL INTERCOURSE. Judgment confirmed."
>
> *Suggs v. State*, 100 S. E. 778.

> "The respondent was charged with having, on the 4th day of June, 1918, committed the crime of statutory rape upon Anna Jaracz, a fe-

made of the age of 15 years. He was convicted of ASSAULT WITH INTENT TO COMMIT SUCH CRIME, and on November 1, 1918, sentenced to Jackson prison for a maximum period of ten years and a minimum of five years. Error is alleged on that portion of the instructions in which the court defined the lesser offenses included in the crime charged, viz., assault with intent to commit rape and assault and battery, and instructed the jury that they might convict of either of these in the event that they found the respondent not guilty of the crime charged. But the crime of which respondent was convicted is included in that with which he was charged. It was the duty of the court under our repeated decisions to so charge. Hall v. People, 47 Mich. 636, 11 N. W. 414; People v. Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360; People v. Ryno, 148 Mich. 137, 111 N. W. 740. A similar question was raised in People v. Miller, 96 Mich. 119, where at page 120 (55 N. W. 675) it is said: 'It is true that upon this record the proof upon one side shows the completed act of sexual intercourse with a girl under the age of 14 years, while upon the other a denial of any offense is made. Under such proof it cannot be denied that a verdict of assault with intent to rape is illogical. But *an assault with intent to commit rape is necessarily included in every rape.* The defendant's counsel are alleging, not an injurious error, but one which, if it could be called an error, has resulted to defendant's advantage.''

People v. Martin, 175 N. W. 233 (Mich.) 1919.

A charge of statutory rape includes the offense of assault with intent to commit rape without force.

"The defendant was informed against for the crime of rape, alleged to have been committed upon a female under the age of 16 years, and upon his trial under such information was convicted of the crime of 'ASSAULT WITH INTENT TO COMMIT THE CRIME OF RAPE.' The particular kind of rape charged by the information was that defined by subdivision 1 of section 261, Penal Code, as follows: 'Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, * * * (1) where the female is under the age of sixteen years.' It is not disputed, of course, that in such a case neither force nor violence is essential to the commission of the crime of rape, or that it is immaterial that the act of sexual intercourse was with the full consent of the female. SHE IS BELOW THE AGE OF CONSENT, AND, AS IT HAS BEEN PUT, 'THE LAW RESISTS FOR HER.' People v. Roach, 129 Cal. 34, 61 Pac. 574. In view of this well established rule, it is now so firmly settled in this state as to be no longer open to question that one who lays his hands upon such a female, with the intent and for the purpose, then and there, to accomplish an act of sexual intercourse with her, is by so doing guilty of an *assault with intent to commit rape*, even though he does not use or intend in any event to use any force or violence, and the female in fact offers no resistance whatever, or even expressly consents to all he does. The offense is complete when he has thus

laid his hands upon her with the intention of then and there accomplishing such purpose, and it is entirely immaterial that he subsequently voluntarily desists, without accomplishing his purpose. As said in People v. Courier, 79 Mich. 366, 44 N. W. 571, quoted approving in People v. Roach, *supra:* 'In cases of this kind it is not necessary that it shall be shown * * * that the accused intended to gratify his passion in all events. If he intended to have sexual intercourse with the child, and took steps looking toward such intercourse, and laid hands upon her for that purpose, although he did not mean to use any force, or to complete his attempt if it caused the child pain, and desisted from his attempt as soon as it hurt, he yet would be guilty of an ASSAULT WITH INTENT TO COMMIT THE CRIME CHARGED IN THE INFORMATION.' The following cases in this state support the conclusions we have stated: People v. Johnson, 131 Cal. 511, 63 Pac. 842; People v. Vann, 129 Cal. 118, 61 Pac. 776; People v. Roach, 129 Cal. 33, 61 Pac. 574; People v. Gomez, 118 Cal. 326, 50 Pac. 427; People v. Lourintz, 114 Cal. 628, 46 Pac. 613; People v. Vardegreen, 106 Cal. 211, 39 Pac. 607, 46 Am. St. Rep. 234; People v. Gordon, 70 Cal. 467, 11 Pac. 762. The rule enunciated in such cases as People v. Fleming, 94 Cal. 308, 29 Pac. 647, is not applicable where the female is under the age of consent. It necessarily follows that the offense of ASSAULT WITH INTENT TO COMMIT RAPE IS INCLUDED IN SUCH A CHARGE OF RAPE AS WAS MADE BY THE INFORMATION IN THIS CASE. Judgment affirmed. Dis-

senting opinion by Melvin, J., but not on this point."

People v. Babcock, 117 Pac. 549.

"The indictment charged that on May 16, 1919, 'one Joe Pittman, late of Bryan county, did unlawfully and feloniously in and upon one Eula Yancey, a female under the age of 14 years, make an assault, and with her, the said Eula Yancey, he, the said Joe Pittman, then and there did have sexual intercourse, she the said Eula Yancey not being the wife of him, the said Joe Pittman, contrary to,' etc. ON HIS TRIAL THE DEFENDANT WAS FOUND GUILTY OF ASSAULT WITH INTENT TO COMMIT RAPE. The court said: In the case of Lee v. State, 7 Okl. Cr. —, 122 Pac. 1111, it is said: 'The prosecutrix, being under the age of consent, was conclusively incapable of legally consenting to an assault with intent to have carnal knowledge of her. Every attempt to commit a felony against the person involves an assault, and if the acts of the defendant, done in furtherance of a purpose to have carnal knowledge of the prosecutrix, constituted an assault to commit rape, if done without her consent, THEN NO ACT OF HERS COULD WAIVE SUCH ASSAULT. That there may be an assault with intent to rape upon a consenting female, where she is under the age of consent, on the ground that in law she cannot consent to such an assault, is held in the following cases: (Citing numerous cases). Where the *proof* is not conclusive as to consummation of penetration, and the *proof* is evident as to assault with intent to commit rape, it is the duty of the trial

court to instruct the jury of their right to convict of the lower offense." Vickers v. U. S. 1 Okl. Cr. 452, 98 Pac. 467.

Pittman v. State, 126 Pac. 696 (Oklahoma).

"Appellant in his brief says: Only one question will be argued in this brief. Briefly stated it is: 'Will an affidavit charging rape on a female child under the age of 16 years, which does not in terms contain a charge of assault and battery, support the verdict and judgment of GUILTY OF ASSAULT AND BATTERY WITH INTENT TO COMMIT RAPE?' The answer to appellant's question will therefore be decisive of this appeal. It has been repeatedly held that every charge of rape necessarily includes a charge of an assault and battery. Mills v. State, 52 Ind. 187; Murphy v. State, 120 Ind. 115, 22 N. E. 106; Richie v. State, 58 Ind. 355; Ewbank's Indiana Criminal Law, No. 771. Counsel for appellant insists that the above rule of law does not apply here for in this case the female was under the age of 16 years, and while she could not consent to the rape, she might consent to the assault and battery; and therefore, in order to support the verdict in this case, the affidavit should have charged that the carnal knowledge WAS FORCIBLY HAD. *In Polson v. State,* 137 Ind. 519, 35 N. E. 907, this court said: 'It is impossible to conceive of a rape without an assault and battery for that purpose. The crime of rape necessarily includes an assault and battery with intent to commit a rape."

Gordon v. State, 98 N. E. 627 (Indiana).

The question raised by appellant was decided against his contention in the case of *Hanes v. State*, 115 Ind. 112, 57 N. E. 704. In the course of the Court's opinion in this case it says, on page 120:

> "The point of insistence is that there can be no assault and battery where it is perpetrated *with the consent of the person assaulted* * * * When perpetrated against a female child under 14 years of age, *consent or nonconsent forms no element of the crime.* The crime is the same whether committed forcibly and against the will or with the voluntary submission of the child. In either case it is a felony. Furthermore, any touching of the person of a female child under the age of 14 years, with intent to perpetrate upon her the act of sexual intercourse, is, and necessarily must be, in legal contemplation without her consent, for *she can give no consent that will make the act lawful.* Hence any indecent liberties taken of the person of the child in the prosecution of that intent and purpose is unlawful, and rude and insolent, to say the least of it, and clearly within the definition of assault and battery."

The affidavit is sufficient to support the verdict of the jury.

And *Beverley v. State*, 98 N. E. 628, affirms the case of *Gordon v. State, supra.* The Court said:

> "The questions involved in this appeal are the same as those considered in Harry Gordon v. State of Indiana (1912), No. 22, 125, 98 N. E. 627, and for the reasons therein stated

> the judgment appealed from * * * finding the appellant guilty as charged, is hereby affirmed."

It is contended by appellant that the prosecuting witness by her consent is an accomplice as in adultery or incest cases, referred to by appellant. There is no similarity between adultery and incest cases and rape, even though the female actually consented. The victim of a rape is never an accomplice (16 C. J., 683), although the female actually consents, if she is under the age of consent. The reference of counsel for plaintiff in error to adultery and incest cases is misleading and is not the law.

> "The victim of rape is *never an accomplice,* the rule in this respect being the same whether the crime is committed by force, or against the will of the female, or by fraud, or consisted of carnal knowledge of a female under the age of consent, *although she actually consented thereto.*"

Therefore, it is not necessary that the testimony of the prosecuting witness, Sonia Malachoff, be corroborated. See *State v. Knighten,* 64 Pac. 867, in which the Court says:

> "It is also contended that there is no evidence corroborating the testimony of the prosecutrix. But in a case of this character the uncorroborated testimony of the prosecutrix is sufficient to sustain a conviction, because she is in no sense an accomplice."

See, also,

> 16 C. J., 683, and authorities cited in notes.

Appellant contends that the Court should have given instructions defining other included crimes, to-wit, assault and battery and simple assault, and attempt. Yet he takes the other horn of the dilemma by alleging an exception taken *nunc pro tunc* on the 22nd day of November, 1921, more than a month after the verdict was returned, and not in the presence of the jury, that the Court erred in refusing to give defendant's requested instruction that the jury could not return a verdict finding the defendant guilty of assault with intent to commit rape, *or assault* (Transcript, p. 162. There is no evidence of the crime of simple assault, and where there is no evidence tending to prove the commission of a lower offense, that is, where the evidence shows that the accused is guilty of the higher offense, or not guilty of any, an instruction on the lower offense is not necessary and is properly refused.

> 16 C. J., page 1224, Sec. 2452, and authorities cited thereunder.

There cannot be assault and battery or assault with consent of the person assaulted even though such person be a minor. But a female under the age of 16 years cannot consent under a charge of statutory rape or assault with intent to commit statutory rape, and the charge of assault or assault and battery is not an included crime under an indictment for statutory rape or assault with intent to commit rape upon a female under the age of con-

sent. As to an instruction for attempt to commit rape, it may be said that no attempt to rape a female under the age of sixteen years could be made without an assault, and attempt to rape such a female is not an included crime under an indictment for statutory rape. Attention is also called to Section 1895, C. L. A., *supra*, providing a life penalty for rape upon a child under twelve years of age. Section 2073, C. L. A., provides that the penalty for an attempt shall be one-half the penalty provided for the crime attempted. Said Section 2073 reads as follows:

> "That if any person attempts to commit any crime, and in such attempt does any act toward the commission of such crime, but fails, or is prevented or intercepted in the perpetration thereof, such person, when no other provision is made by law for the punishment of such attempt, upon conviction thereof, shall be punished as follows:
>
> "First. If the crime so attempted be punishable by imprisonment in the penitentiary or county jail, the punishment for the attempt shall be by like imprisonment, as the case may be, for a term not more than half the longest period prescribed as a punishment for such crime.
>
> "Second. If the crime so attempted be punishable by fine, the punishment for the attempt shall be by fine not more than half the amount of the largest fine prescribed as a punishment for such crime."

Where the penalty under the indictment is life, as in the case at bar, Section 2073, C. L. A. would reduce a verdict of attempt to commit the crime to an absurdity. However, if one-half the life of the prisoner could be determined, and the expectancy of a man forty-five years of age be placed at fifteen years. his sentence would necessarily be greater than the sentence which was imposed by the Court on the plaintiff in error. The verdict resolves in his favor from every viewpoint.

The verdict of a jury as to the weight and sufficiency of the evidence should not be disturbed unless prejudice to defendant exists, because the trial jury and the Court having the opportunity to see and observe the witnesses and their demeanor while testifying, are in better position than the appellate court to say what weight or credence should be given to the witnesses. Therefore, as the prosecuting witness does not need to be corroborated in her testimony, she not being an accomplice, the jury were the judges as to whether or not they believed her; and they evidently did believe the prosecuting witness in this case, as is indicated by their verdict.

Wherefore, by reason of the facts in this case as contained in the testimony; the fact that no objections or exceptions were taken to the testimony at the trial; the fact that only one instruction of the Court was excepted to by the defendant in the presence of the jury as the law requires, and particularly

by reason of the law, I most respectfully submit that the judgment of the Court below should be affirmed.

A. G. Shoup,
United States Attorney, First Division,
District of Alaska.

No. 3808

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PETER SEKINOFF,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Reply Brief

In Error to the District Court for the Territory of Alaska, Division Number One, Juneau.

Reply Brief for Plaintiff in Error

DEMURRER TO INDICTMENT

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SOME INACCURATE STATEMENTS

There are some inaccurate statements in the brief for defendant in error relating to the origin and relationship of certain statutory laws of Oregon and Alaska, which must be corrected before the real merits of the argument in this case can be understood and agreed on.

On page nine of his brief the United States Attorney begins his answering argument by referring to sections 1894 and 1898 of the Compiled Laws of Alaska, 1913, defining the crime of rape

and assault with intent to commit rape, in Alaska, and declares: *"These two sections were borrowed bodily from the Oregon Code."*

While it may be admitted that some of the statutory laws of Alaska are identical with some of the Oregon laws, counsel for the United States is entirely mistaken when he declares that sections 1894 and 1898 were borrowed from Oregon by the Congress which enacted the Alaska Criminal Code of 1899.

The purpose counsel for defendant in error had in making such an inaccurate statement to the court was evidently to bind the plaintiff in error to the exact phraseology used by Judge Wolverton in the opinion in *State vs. Sargent*, 32 Or. 110, 49 Pac. 889, and to limit this court to the construction so announced in that case—as understood by counsel for defendant in error.

If this court will compare section 1894, Alaska, on page 18, of the brief of plaintiff in error in this case, with the section 1733, Hill's Ann. Laws Or., as amended (see Sess. Laws 1895, p. 67), on page 10 of the brief of defendant in error in this case, the fundamental difference of the two sections will be instantly disclosed and the inaccuracy of counsel shown.

Counsel for defendant in error is also inaccurate in the next succeeding paragraph of his brief,

in continuing the mistake about the origin of the section 1894, Alaska, when he says (italics mine): "The doctrine that *assault with intent to commit rape is an included crime, under the Oregon statutes, in an indictment for statutory rape,* is well stated and settled in the Oregon case of *State vs. Sargent* (49 Pac. 889). Judge Wolverton, *in passing upon this point and commenting upon the identical statutes under which the verdict in the case at bar was found, said:*" (Here follows quotation).

Now, aside from the facts that section 1894 of the Alaska statutes was *not* "borrowed bodily from the Oregon Code," and is *not* identical with the statute quoted in *State vs. Sargent,* and that Judge Wolverton *did not* comment "upon the identical statutes under which the verdict in the case at bar was found," but *did* correctly quote the Oregon statute upon which the case of *State vs. Sargent* was based, and *did not* announce any such doctrine that assault with intent to commit rape is an included crime under the Oregon statute, in an indictment for statutory rape, but *did* fairly disclose in his opinion that the defendant in the case of *State vs. Sargent* was actually *indicted* for and *convicted of assault with intent* to commit rape *under section* 1740 of the then Oregon Code, and *not* under the *section* 1733 thereof, relating to and de-

fining statutory rape, the above quotation from the brief of defendant in error is innocuous.

Counsel for defendant in error having become confused and inaccurate in his judgment about the facts and principles of law upon which the case of *State vs. Sargent* was decided, thereafter wandered farther afield in his unclassified quotations from other cases, based on other statutes widely unlike section 1894, Alaska.

1. The statutory definitions of rape are as numerous as the State codes, no two are alike; Alaska statute, under consideration in this case, is unique and unlike all others.

2. The case at bar rests for final decision upon this court's construction of the intent and purpose of section 1894, Alaska, upon which the indictment in this case was returned, and not upon common law definitions, or the statutes or decisions of other States.

3. It is a fundamental principle in criminal law that a defendant cannot be legally convicted of any crime which is not included within the averments of the charging part of the indictment; if, as to any crime not specifically charged, the necessary descriptive or charging averments are not included in the indictment, as to that crime the indictment does not state facts sufficient to constitute the

crime; and especially is that true if it is apparent on the fact of the indictment, as in the case at bar, that averments are purposely omitted, so as to limit the charge to a specific crime—in such case one cannot be convicted of a crime whose necessary elements are thus purposely omitted from the indictment.

THE OREGON RULE

Counsel for defendant in error has made the case of *State vs. Sargent*, 32 Or. 110, 49 Pac 889, his *piece de resistance*, so to speak, in his brief, and seems to think it settles about all the questions in the case at bar. We quoted that case in our original brief, at page 9, on the only question really decided by that court, but did not then (and do not now) think it touched the other important question in this case.

Because of the stress laid on that case by the defendant in error counsel for plaintiff in error in this case made a personal examination of the entire record in the Sargent case, and found, as stated by Judge Wolverton in his statement and opinion, that the defendant Sargent had been *indicted* for and *convicted* of an *assault with intent to rape* a female child under the age of consent. The indictment was found under and based on section 1740, Hill's Ann. Laws Or., which provided a penalty against any person guilty of an

assault with intent to commit rape, and it was not found or based on the section 1733 of that statute providing penalty for statutory rape.

The following is a copy of the charging averments in the Sargent indictment:

"Chet Sargent, accused by the grand jury of the County of Morrow, by this indictment, of the crime of assault with intent to commit a rape, committed as follows:

"The said Chet Sargent on the 14th day of April, A. D. 1896, in the County of Morrow and State of Oregon, he, the said Chet Sargent, being then and there over the age of sixteen years, unlawfully and feloniously, in and upon one Bessie Robbins, a female child, under the age of sixteen years, to-wit, of the age of about eight years, an assault did make and her, the said Bessie Robbins, then and there did ill treat and lay hold of and forcibly throw upon the hay, and did lay his body upon and against her, the said Bessie Robbins, with the intent then and there, her the said Bessie Robbins, forcibly and against her will, felonously to carnally know and ravish and carnally abuse, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon."

Under the Oregon statute quoted by Judge Wolverton and the charging averments of the in-

dictment in that case, it is clear there could be no question in the Sargent case such as is presented in the case at bar. Every element of the crime of assault with intent to commit rape is charged in the Sargent indictment—but they are not charged in the indictment in the case at bar.

The indictment in this case does *not* charge "assault with intent to commit a rape," nor that it was "forcibly and against her will," as in the Sargent case, nor make any other averments of force from which the jury or the court could infer an assault with intent. On the contrary, it was carefully drawn by the United States Attorney, upon the facts known to him, to charge only the crime denounced in the second clause of section 1894, Alaska, *which crime could only be perpetrated "with her consent."*

Upon demurrer the indictment on the Sargent case would be held to be direct and certain as against every requirement of section 2150, Alaska, (page 19 on original brief)) because it was direct and certain as regards, 1 the party charged, 2 the crime charged, and 3 the particular circumstances of the crime charged when they are necessary to constitute a complete crime.

But the Sakinoff indictment, in the case at bar, considered as an indictment for "assault with intent

to commit rape," would be open to a demurrer that it does not state facts sufficient to constitute that crime. An indictment which does not state facts sufficient to constitute a crime—no court ought to sustain such an indictment, or imprison a citizen upon a verdict based thereon.

THE CALIFORNIA RULE

In the case of *People vs. Babcock* (Cal) 117, Pac. 549, cited by defendant in error at page 18 of his brief, the court holds plainly that a charge of statutory rape includes the offense of assault with intent to commit rape without force.

That ruling is not inconsistent with the definition of rape as stated in the California statute quoted by the court in that opinion:

"[1] The particular kind of rape charged by the information was that defined by subdivision 1 of section 261, Penal Code, as follows: "Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator * * * (1) where the female is under the age of sixteen years."

Note that the element of force is not purposely excluded in this definition as it is in the second clause of the Alaska section 1894. Nor are we advised what averments are charged in the indictment in the Babcock case. It may be that an examination of that indictment would show that it

charged facts sufficient to support the element of force, though that court said, following the quotation above:

"It is not disputed, of course, that in such a case neither force nor violence is essential to the commission of the crime of rape, or that it is immaterial that the act of sexual intercourse was with the full consent of the female."

Whatever the averments in the Babcock indictment may have been it is interesting to note that long after the decision in that case the courts of that State, in the case of *People vs. Akin*, 143 Pac. 795, cited and quoted on page 21 of plaintiff in error brief in this case, said:

"It is thus to be seen that the element of force is not charged, as indeed it is not required to constitute the offense of rape on the person of a female under the age of consent. The crime of assault with intent to commit rape necessarily implies, however, the use of force and violence, and negatives the idea of consent upon the part of the victim. Of course, if the defendant had been charged with rape on the person of an adult, the element of force would have been included in the charge, and thus the information would have comprehended the crime of which he was convicted. Or, if the defendant had been convicted of an 'attempt to com-

mit rape,' we could say that it was covered by the charge, because every crime includes an attempt to commit said crime. But 'an assault implies repulsion, or at least want of consent on the part of the person assaulted.' * * * *The same criticism might be made of the instruction given here, but in addition we think the verdict does not respond to the averments of the information. This is not a technical objection, but it goes to the fundamental right of the defendant to be formally charged with the crime of which he may be convicted.*"

Does the Atkin case state the correct rule in California?

THE OKLAHOMA RULE

The case of *Pittman vs. State*, 126 Pac. 696, from Oklahoma, cited in the brief of counsel for defendant in error, was begun under a statute which provided:

"2414. Rape defined. Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances: First, where the female is under the age of sixteen years," etc.

Rev. Laws of Oklahoma, 1910, Vol. 1.

This case, however, cannot be authority against us, because upon its face it shows that the indictment specially charged that

"One Joe Pittman, late of Bryan County, did unlawfully and feloniously in and upon one—a female under the age of fourteen years, make an assault, and," etc.

It may be admitted that where the indictment contains the necessary averments of facts charging an assault there may be a conviction for an assault. But that is not the fact in the case at bar, and the Oklahoma decision strengthens, rather than weakens, our argument.

THE GEORGIA RULE

The case of *Suggs vs. State* (Ga.) 100 Southeastern, 778, cited by counsel for defendant in error, is scant in its disclosures. Only the syllabi of the case are in the reporter, and nothing is shown of the averments in the indictment. The case was based upon an Act of the Georgia assembly, found at page 259, of the Acts of the General assembly, 1918. A careful examination of the act discloses that no provision is contained in it, similar to the second clause of section 1894, Alaska. It merely declares "sexual or carnal intercourse with any female child under the age of fourteen years" to be rape, without saying anything about force or consent, or otherwise defining the crime. In all probability the indictment in that case contained

the usual averments of every necessary element of the crime of rape, including those of assault.

THE INDIANA RULE

Counsel also cites the leading case from Indiana, *Gordon vs. State*, 98 Northeastern, 627, and the other Indiana cases cited therein. But an examination of the Indiana statute in connection with the strong language used in the decision leaves no doubt that no such question was ever presented there as in the case at bar.

The Indiana statute reads:

"Section 2250. Whoever unlawfully has carnal knowledge of a woman, forcibly and against her will, or of a female child under sixteen years of age, is guilty of rape."

Burns Ann. Ind. Stat., 1914, Vol. 1.

The Indiana court in the Gordan case said:

"It is impossible to conceive of a rape without an assault and battery for that purpose. The crime of rape necessarily includes an assault and battery with intent to commit rape." Judging from the statute and that language it is also impossible to conceive of the Indiana court sustaining an indictment or a conviction based on an indictment for rape, or assault with intent to commit rape, which does not charge the necessary elements of the crime.

Then, too, the affidavit quoted in this case does so charge the elements of an assault and the case is not in point against us.

THE NEVADA RULE

Counsel for defendant in error in declaring that section 1894, Alaska, defining rape in that Territory and under which the indictment in this case was drawn, was borrowed bodily by Congress from the Oregon Code, raised an interesting question. That statement was evidently made with the idea of binding us to the ruling in the Sargent case, and limiting the United States Circuit Court of Appeals thereby, in its construction of that section. But a comparison of the section 1894, Alaska, found at page 18 in our original brief, and the section 1733, Oregon, quoted by Judge Wolverton in the Sargent case, found on page 10 of the brief of defendant in error, show that the two sections are entirely dissimilar, and not even identical in meaning or idea.

Counsel for plaintiff in error are not able, with certainty, to advise this court from what State section 1894, Alaska, was borrowed, but judging from well-known facts and phraseology suggests that the Alaska section was borrowed from the Nevada code, since it is more nearly like the phrase-

ology and ideas of that than any other statute counsel can find, with their limited library facilities.

In 1899-1900, when the Alaska codes were being drafted by Congress, Senator Carter, of Montana, was the chairman of the Senate Committee on Territories, and had charge of the preparation of those codes. They were prepared by cutting and pasting from the codes of the western states and it may be the section 1894 was thus borrowed from Nevada, with whose laws Senator Carter was familiar. It was evidently not copied from the Montana definition of rape, for that more nearly resembles the statute of California. The statutory definitions of rape in Nevada and Wyoming are nearly identical with that in Alaska, and counsel thus suggests the Nevada genesis of section 1894, Alaska.

The Nevada section, Rev. Laws Nevada, 1912, section 6442, now reads as follows:

"Section 177. Rape is the carnal knowledge of a female forcibly and against her will. * * * and any person of the age of sixteen years or upwards who shall have carnal knowledge of any female child under the age of sixteen years, either with or without her consent, shall be adjudged guilty of the crime of rape, and be punished as before provided."

So far as we can ascertain that was the Nevada statute when the Pickett case arose: *State vs. Pickett*, 11 Nev. 255; 21 Am. Rep. 754; Book 35 Pacific States Reports.

In that case, as in this, the trial court instructed the jury upon the elements of the crime of rape, and then added:

"But if the jury believe that the defendant attempted to commit a rape and failed to affect a penetration, as above described, they should find a verdict of guilty of an assault with the intent to commit rape."

The supreme court of Nevada held that instruction to be error, and reversed the case therefor, and said:

"The common law definition of rape is "the carnal knowledge of a woman forcibly and against her will," (4 Blacks, Com. 210). The same definition is adopted by our statute (Comp. Laws, Sec. 2350). Under this definition an assault is a necessary ingredient of every rape, or attempted rape. But it is not a necessary ingredient of the crime of carnally knowing a child under the age of twelve years, with or without her consent, which is defined in the latter part of the section, and which is called "rape." It is obvious that here are two crimes differing essentially in their nature,

though called by the same name. To one force and resistance are essential ingredients, while to the other they are not essential; they may be present or absent without affecting the criminality of the fact of carnal knowledge. As an assault implies force and resistance, *the crime last defined may be committed, or at least attempted, without an assault, if there is actual consent on the part of the female.*"

THE ALASKA STATUTE

Counsel has again quoted from Judge Beatty's opinion in the Pickett case because of the almost exact similarity of the two statutory definitions under consideration, and because it more clearly discloses just what the elements of the crime are which is denounced in the second clause of section 1894, Alaska.

That section defines two crimes, and two only, and its provisions, if carefully analyzed and understood, are logical and easily applied to the long established principles of law relating to the crime of rape.

Section 1894. That whoever has carnal knowledge of a female person, forcibly and against her will, *or, being sixteen years of age, carnally knows and abuses a female person under sixteen years of age, with her consent, is guilty of rape.*"

Now, the first clause of that section, as pointed out by Judge Beatty in the Pickett case, is the old common law definition of rape.

"Under this definition," he says, "an assault is a necessary ingredient of every rape, or attempted rape." The second clause of the Alaska section, however, is unique—*sui generis*—and differs from all other definitions of statutory rape, which counsel has been able to find, for it cannot be violated without the act is committed "*with her consent.*" In other words, the substantive crime described in the second clause is not a crime without it appears, and is so averred in the indictment, that the carnal knowledge was had "*with her consent.*" Without that fact appears affirmatively there is no crime, under the second clause. In the Nevada statute it is a crime to have "carnal knowledge of any female child under the age of sixteen years, *either with or without her consent,*" but in the Alaska statute there is no crime committed, under the second clause, unless the act was committed "*with her consent.*"

In the crime defined in the second clause there are four distinct elements described, each of which, under the ordinary rules, must be affirmatively charged and averred in the indictment and proved on the trial, to secure a legal conviction:

1. The defendant must be sixteen years old, or older,

2. He must carnally know and abuse a female person,

3. Under sixteen years of age,

4. WITH HER CONSENT.

If either of these necessary elements is lacking in the charging part of the indictment, it will not state facts sufficient to charge the crime; if the prosecution fails to prove either, the court should direct a verdict for the defendant.

In a much stronger measure the words of Judge Beatty, declaring the different characters of the two crimes stated in the Nevada statute, are applicable to the two different crimes stated in the Alaska section. His statement with respect to the substantive crime stated in the first clause of the Navada statute applies exactly to the first substantive crime stated in the Alaska section. But all that he says with respect to the character of the crime defined in the second clause of the Nevada statute, while true of the second clause and crime stated in the Alaska statute, does not go far enough, for the crime so defined and so clearly stated in the second clause of the Alaska statute cannot be committed "without the consent" of the female, as it

can under the Nevada clause, *but only "with the consent."*

Even more clearly, then, than the Nevada statute, the Alaska statute excludes every possible element of force and violence from the character of the crime created in the second clause of the Alaska law,—intentionally and purposely, by every rule of grammar and legal construction. The intent of Congress in enacting that second clause is clear and without the need of construction. Without the act denounced in the second charge of the Alaska statute is committed "with the consent" of the female, there is no crime.

We frankly submit, then, to this court:

1. That the second clause of section 1894, Alaska, by its clear and positive provisions, excludes from the elements of the crime defined therein every element of force or violence from which an assault with intent may be found or inferred.

2. That the indictment in this case was drawn under that clause and does not charge or aver any fact upon which force or violence, or assault with intent, can be based or inferred;

3. That the testimony in this case does not contain any evidence tending to prove the use of any force or violence, or any assault with intent, or otherwise, directly or by inference;

4. That the instruction on assault given by the trial judge was not given to meet any definition of the statute, or any charge of the indictment or any proofs offered on the trial, but by mistake in reference to the element of attempt.

Now the indictment in this case was not sought to be drawn under the first clause of section 1894, Alaska,—no charge that it was "forcibly and against her will" is averred; it is conceded that it was meant to charge the defendant under the second clause, and the indictment does not affirmatively charge that the act was done "with her consent," which is just as necessary a charge or element in the second clause, as "forcibly and against her will," is in the first. The indictment does not state facts sufficient to constitute the crime defined in the second clause of section 1894, Alaska, and since it is never too late to raise that question:

Comes now the plaintiff in error, the defendant below, by James Wickersham and J. W. Kehoe, his attorneys, and demurs to the indictment in this case, and for ground of demurrer thereto says (1) *that the said indictment shows upon its face that it does not state facts sufficient to constitute any crime, and* (2) *because it shows upon its face that it does not state facts sufficient to constitute the*

crime of assault with intent to commit rape, with which crime defendant was convicted upon said indictment.

JAMES WICKERSHAM,
J. W. KEHOE,
Attorneys for Plaintiff in Error,
Defendant Below.

No. 3808

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PETER SEKINOFF,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, DIVISION NUMBER ONE.

Petition for Rehearing

JAMES WICKERSHAM,
J. W. KEHOE,
Attorneys for Petitioner.

JUNEAU SUNDAY CAPITAL PRINT

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Petition for Rehearing

TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT:—

The undersigned, the plaintiff in error, petitioner, respectfully submits that he has been aggrieved by an opinion of your Honors rendered herein on the 7th day of August, 1922, in the re-

spects hereinafter set forth, and prays for a rehearing of said matter upon the following grounds:

(1) That an indictment was returned against this petitioner in the District Court for the Territory of Alaska, First Division, on October 11, 1921, for the crime of statutory rape charging that the defendant did—

"being then and there over the age of sixteen years, knowingly, wilfully, wrongfully, unlawfully, feloniously, carnally know and abuse Sonia Malachoff, the said Sonia Malachoff being then and there a female person and then and there under the age of sixteen years, to-wit, of the age of eleven years," etc.

(Page 2. Transcript of Record.)

(2) That on the trial of this petitioner in said court on said charge on the 20th day of October, 1921, the jury drawn to try the case returned a verdict therein against this petitioner, defendant there, as follows:

"We, the jury empaneled and sworn in the above-entitled cause, find the defendant guilty of assault with intent to commit Rape.

Dated at Juneau, Alaska, this 20th day of October, 1921.

"J. C. READMAN, Foreman."

(Page 164. Transcript of Record.)

(3) That thereafter and on November 2nd, 1921, the judge of the trial court passed sentence

and judgment against this petitioner that he was "guilty of the crime of Assault with intent to commit Rape", and sentenced petitioner to serve six years in the United States Penitentiary at McNeil's Island, in the State of Washington, where petitioner is now confined.

(4) That upon the matters and things shown and stated in the printed transcript of record in this cause, in this court, the said cause was removed from the trial court to this court for review upon the errors alleged therein to have occurred at the trial in the court below, and upon the briefs filed herein by the respective attorneys in this cause, the Honorable Judges of this court did consider said alleged errors and the other matters therein and did on the 7th day of August, 1922, render and file their opinion herein, and did therein and thereby affirm the judgment and sentence against this petitioner for the reasons and conclusions stated in said opinion.

(5) That through inadvertence and mistake the said opinion does not correctly or at all decide the matters at issue in said cause as presented to the judges of this court in the Assignment of Errors and Briefs of Counsel, and by reason whereof the judges did in said opinion declare and decide as follows:

"There was abundant evidence to sustain the

verdict of the jury to the effect that the defendant attempted to commit the crime distinctly charged in the indictment against him and distinctly defined in the second clause of Section 1894 of the Statute of Alaska above set forth, and that in such attempt he committed acts toward the commission of that crime, the punishment for which is declared in Section 2073 of the Alaska statute above cited. And we think it clear that such attempt is necessarily included in the crime charged against the defendant by the indictment by virtue of Sections 2269 and 2268 of the Alaska laws that have been quoted.

"Finding no substantial error in the instructions complained of, the judgment is AFFIRMED."

(6) That the inadvertence, error and mistake made by this court in the foregoing excerpt from the court's opinion consists in this, to-wit: (a) Because there was no verdict of a jury in this cause to the effect that the defendant attempted to commit the crime distinctly charged in the indictment against him and distinctly defined in the second clause of section 1894 of the statute of Alaska above set forth, and that in such attempt he committed acts toward the commission of that crime, the punishment for which is declared in section 2073 of the Alaska statute above cited, or at all; that the only verdict of a jury in this cause is that verdict set forth in the Transcript of Record in this cause at

page 164, and was and is to the effect that the defendant had committed the crime of Assault with intent to commit Rape, and not the crime of Attempt to commit the statutory rape charged in the indictment. (b) Because the trial court did not instruct the jury below that "such attempt is necessarily included in the crime charged against the defendant by the indictment by virtue of sections 2269 and 2268 of the Alaska laws that have been quoted," and the neglect and refusal of the trial court to so instruct the jury and to submit to the jury the included crime of Attempt to commit Rape, and the lesser offenses included in the crime charged in the indictment was and is one of the errors alleged in petitioner's Assignment of Errors; and this court in the above excerpt from its opinion mistakes the fact in respect to that matter, by assuming it was done, when in fact it was not done, and the refusal to do it was clearly stated as error in petitioner's Assignment of Errors numbers 4, 5, 6, 8 and 9. (c) Because the above excerpt from the court's opinion mistakenly assumes that the petitioner was found guilty of the crime of Attempt to commit the crime of Rape, a crime necessarily included in that for which petitioner was so indicted, when he was in fact found guilty by the verdict of the jury of the crime of Assault with intent to commit Rape, a crime which is NOT in-

cluded in that with which he was charged in the indictment, and the difference between which two crimes is the principal point of contest in his Assignment of Errors, and Brief and Argument before this court. (d) Because by reason of the aforesaid inadvertence and mistake this court has affirmed a conviction against defendant for a crime which the lower court refused to submit to the jury, and for which he was not found guilty by the jury. (e) Because by reason of the aforesaid inadvertence and mistake this court has not given weight to or decided upon the other assigned errors of the court below which are argued and submitted to this court in the briefs in this cause for its opinion and decision thereon.

(7) Among the errors of the lower court assigned and argued to this court in this cause and which were not noticed, or if noticed, were mistakenly treated, are the following:

(a) Relating to Attempts

The lower court did not submit to the jury the question of whether or not defendant was guilty of the crime of Attempt to commit the crime charged against him in the indictment, or attempt to commit the lesser degrees thereof necessarily included therein, under sections 2073, 2268 and 2269 of the laws of Alaska referred to in the court's opinion, but did specifically and affirmatively wholly with-

draw any consideration in relation to said Attempts from said jury by his Instructions numbered 14.

(Page 156. Transcript of Record.)

Defendant reserved an exception to this action of the court in his exception to Instruction XI, where the error first occurred, and assigned error therefor in his various assignments numbered 1, 4, 5, 6, 8 and 9.

This alleged error was fully presented in Brief of Plaintiff in Error, pages 23-26.

Aside from the mistake of facts, in relation thereto the court's opinion on the matter of Attempts in this case is acquiesed in by counsel for the defendant, who quite approve that part of the opinion saying (italics mine):

"*And we think it clear that such attempt is necessarily included in the crime charged against the defendant by the indictment by virtue of Sections 2269 and 2268 of the Alaska laws that have been quoted.*"

Unfortunately for the defendant, however, the lower court took the opposite view of the matter and not only did not give such instruction to the jury but withheld it by his instruction number 14, wherein he limited the jury's power as follows:

"XIV"

"I hand you three forms of verdict—1. finding the defendant guilty as charged in the indict-

ment; 2. finding the defendant guilty of assault with intent to commit rape; and, 3. not guilty. When you retire you will elect one of your number as foreman, and he will sign the form of verdict agreed upon and return the same into court."

(Page 156. Transcript of Record.)

This instruction shows that the lower court may have mistaken the element of "assault" for that of "attempt" and that he instructed the jury on "assault", an element which was not necessarily or at all included in the crime charged in the indictment, and did not charge on the element of "attempt", about which this court says "we think it clear that such attempt is necessarily included in the crime charged against the defendant by the indictment by virtue of Sections 2269 and 2268 of the Alaska laws that have been quoted."

The Supreme Court of Kansas in a similar case said (italics mine):

"In a prosecution for statutory rape, where there was evidence tending to show no more than an attempt, it was held to be the duty of the court to instruct the jury as to the law of attempt to commit the offense, *although the defendant had not asked for such an instruction.*"

State vs. Grubb, 55 Kan. 678; 41 Pac, 951.

State vs. Langston, 106 Kan, 672; 189 Pac. 153.

(Page 25, Brief of Plaintiff in Error.)

(b) Relating to Assault With Intent

The lower court instructed the jury in his Number XI, "that the crime of assault with intent to commit rape is necessarily included in the crime of rape as charged in the indictment in this case," etc., and in instruction XIII, further charged the jury that if they found that "the defendant, with intent to have sexual intercourse with the said Sonia Malachoff and having the apparent present ability to consumate said act laid hands on the said Sonia Malachoff in pursuance of said intent, or did some act toward the accomplishment of the act intended and was prevented from accomplishing the full act of rape, as I have heretofore instructed you, by causes outside of the will of the said defendant then the defendant would be guilty of the crime of assault with intent to commit rape and you should render your verdict accordingly," etc..

(Page 155. Transcript of Record.)

Defendant reserved exceptions to both those instructions (Pages 156-159, Transcript of Record), and also requested:

"Defendant's request for Instruction No. 2.

"Under the law of Alaska, the crime of rape may be committed forcibly, or, in the case of a child under the age of sixteen years, the mere act of sexual intercourse, even though such child consented thereto, if proved, constitute what is called statu-

tory rape. In this case the indictment does not allege that force was employed, and it is therefore, presumed that the act, if committed as alleged, was done with the consent of such child. Under these circumstances, I charge you that you cannot return a verdict finding the defendant guilty of assault with intent to rape or assault, and your verdict must be either guilty or not guilty of the crime charged in the indictment."

This requested instruction was refused and an exception taken.

(Page 162. Transcript of Record)

Assignment of error was based thereon.

(Page 171. Transcript of Record.)

And the matter was presented in the Brief for Plaintiff in Error, pages 18-23.

Section 1894 of the Compiled Laws of Alaska, 1913, was section 14 in Carter's Annotated Alaska Codes, 1900, and was taken by Congress in its compilation of the Penal Code of Alaska, of March 3, 1899, from Bate's Anno. Ohio Statutes, Sec. 3816. See annotations to Sec. 14 and 15, Penal Code Alaska 1899, in Carter's Codes, page 4, 1900.

Now before Section 14, Carter's Codes, being Sec. 1894, Compiled Laws Alaska, 1913, was borrowed by Congress in 1899 from Section 6816, Bate's Anno. Ohio Stat. it had received construction by the Supreme Court of Ohio in the case of

Smith v. State, 12 Ohio State, 466, where the court decided (syllabus):

"An attempt by a male person of the age of seventeen years and upward, to carnally know and abuse a female child under the age of ten years, *with her consent*, is not indictable under the 17th section of the 'Act providing for the punishment of crimes,' as an *assault* with intent to commit rape."

The last clause of the fifth section of the same statute is the Ohio statutory equivalent of the last clause of section 14, Carter's Annotated Codes and Section 1894, Compiled Laws of Alaska, 1913, and is stated in Smith v. State, supra, page 469, as follows (with italics by Ohio Supreme Court):

"If any male person of the age of seventeen years and upwards, shall carnally know and abuse any female child, under the age of ten years, *with her consent*, every such person so offending, *shall be deemed guilty of rape*," etc.

Counsel has not been able to examine this clause in Sec. 6816, Bates Annotated Ohio Statutes, from which in 1899 Congress borrowed it for Alaska, but the form quoted by the Supreme Court of Ohio in the case of Smith vs. The State, supra, is identical in meaning though differing slightly in phraseology from the Alaska form. Whether the Ohio form in Bate's Annotated Ohio Statutes, Sec. 6816 is more nearly identical with our section, counsel cannot

say, but it is certain that in the exact sense of our statute it was construed by the Supreme Court of Ohio in the Smith case at the December Term, 1862, of that court. And our Congress borrowed it in 1899 and inserted it in the Alaska Statutes with knowledge of its construction, for the case of Smith v. The State, 12 Ohio State, 466, is cited as an annotation to Section 18, Carter's Codes, in relation to assault with intent to commit rape, in 1900.

Where an English statute is adopted into our legislation, the known and settled construction of it by courts of law is received as authority.

Tucker v. Oxley, 5 Cranch, 34; 3 L. Ed. 29.

Pennock v. Dialogue, 2 Pet. 1; 7 L. Ed. 327.

Cathcart v. Robinson, 5 Pet. 264; 8 L. Ed. 120.

McDonald v. Hovey, 110 U. S. 619; 28 L. Ed. 269.

Warner v. Texas Ry. Co. 164 U. S. 418; 41 L. Ed. 405.

The known and settled construction of laws by courts of the state from which they are taken is presumed to be adopted with the adoption of the laws.

Brown v. Walker, 161 U. S. 591; 40 L. Ed. 819.

The adoption by Congress of a state statute includes the adoption of construction previously given to it.

Willis v. Eastman Trust Co. 169 U. S. 295; 42 L.

Ed. 752.

A statute taken from another state will be presumed to be taken with the meaning it had there.

Henrietta Min. Co. v. Gardner, 173 U. S. 123; 43 L. Ed. 637.

The rule ordinarily followed in construing statutes is to adopt the construction of the courts of the country by whose legislature the statute was originally adopted. In this case the court follows the construction of the state which was the source of the statute, to-wit, Massachusetts; not that of the state from which the statute was immediately taken, to-wit, California.

Coulam v. Doull, 133 U. S. 216; 33 L. Ed. 596.

The courts of the Indian Territory are bound to respect the decision of the Supreme Court of Arkansas interpreting the laws of that state which were adopted and extended over the Indian Territory by the Act of Congress of May 2, 1890.

Robinson & Co. v. Belt, 187 U. S. 41; 47 L. Ed. 65.

And this court, in a well considered case from Alaska held: "A statute adopted from another state which has been construed by the highest court thereof is presumed to be adopted with the construction thus placed upon it."

Jennings v. Alaska Treadwell Co. 170 Fed. 146, 95 C. C. A. 388.

In this case the court further said:

"It is true the two stautes are not identical as a whole, but the change in the Alaska code from the Oregon code makes more definite and certain the purpose of Congress," etc.

Jennings v. Alaska Treadwell Co., supra, page 149.

Where a statute of a state is adopted by another state or by Congress, the construction previously given to such statute by the highest court of that state presumably becomes a part of the law so adopted.

Love v. Pavlovich, 222 Fed. 842; 138 C. C. A. 268.

Mustard v. Elwood, 223 Fed. 225; 138 C. C. A. 467.

Counsel for petitioner, then, assume that this court will be bound to accept, in this case, that construction given Sec. 1894 by the Supreme Court of Ohio in the foregoing case of Smith v. The State, 12 Ohio State, 466.

Counsel in this case must share in whatever mistake has been made in the correct understanding of the issues presented in the argument, for in the Brief of Defendant in Error, page 9, the United States Attorney declared, in reference to Sections 1894 and 1898, Compiled Laws of Alaska, 1913, that—

"These two sections were borrowed bodily from the Oregon Code"—and thereupon undertook to bind us by quoting Judge Wolverton's decision in State v. Sargent, 49 Pac. 889—an Oregon case. In

the Reply brief for plaintiff in error, counsel for defendant pointed out to the court that those two sections had not been borrowed from the Oregon laws at all, and suggested the apparent relationship between Sec. 1894, Alaska, and Sec. 177, Rev. Laws of Nevada, 1912, and cited State v. Pickett, 11 Nev. 255, 21 Am. Dec. 754, Book 35 Pacific State Reports.

(Reply Brief for Plaintiff in Error, pages 13-16.)

The United States Attorney, discovering he had made a mistake, prepared a telegram and asked counsel for defendant to sign it with him, and forwarded it to the Clerk of this court, on March 29, 1922, as follows:

"Juneau, March 29, 1922.

"Frank D. Monckton,

"Clerk U. S. Circuit Court of Appeals,

"San Francisco, Cal.

"Section fifteen Alaska Penal code in Carter's Annotated Alaska Codes cites Bates Annotated Ohio Statutes section sixty-eight seventeen as origin of section eighteen ninety-four and eighteen ninety-eight compiled laws of Alaska about which discussion in Sekinoff against United States. Will you advise Judges for us.

"A. G. SHOUP, U. S. Attorney,

"JAMES WICKERSHAM, Attorney for Plaintiff in Error."

and thereupon on the following day counsel for plaintiff in error sent the following telegram to the Clerk of this court:

"Frank D. Monckton,

"Clerk U. S. Circuit Court Appeals,

"San Francisco, Cal.

"In view of agreement counsel case Sekinoff against United States pending after argument that Alaska Statute section eighteen ninety-four Compiled Laws under which Sekinoff indictment was drawn came from Ohio Statutes may I properly call attention of court to case Smith against State twelfth Ohio State Reports page Four sixty-six. United States Attorney notified.

"JAMES WICKERSHAM."

The Clerk of the Circuit Court of Appeals made written acknowledgment of the receipt of both telegrams, one on March 30, and on March 31, the second, as follows (omitting headings):

"March 31, 1922.

"No. 3808

"Sekinoff v. U. S.

"My Dear Judge:

"I beg to acknowledge receipt of your wire dated the 30th instant, and to advise you that three typewritten copies thereof have been made and filed as additional authority on behalf of plaintiff in error and a copy distributed to each of the judges

to whom the case is submitted.

"Very truly yours,

"F. D. MONCKTON, Clerk,

"By O'Brien, Deputy Clerk."

Upon this record, we think the court should now give effect to the general rule; that the construction of the borrowed law, Sec. 1894, Compiled Laws of Alaska, 1913, upon which the indictment in this case is based, should follow that given to it by the Supreme Court of Ohio in Smith v. The State, 12 Ohio State Reports, 466.

We also call attention to the record in Smith v. the State, supra, which shows that Allen G. Thurman and other leading lawyers of Ohio argued the case for the plaintiff in error before the Supreme Court of that state, while the State was represented by its Attorney General. We also cite the case of O'Meara v. State of Ohio, 17 Ohio State, 516 (518), where the Supreme Court reaffirmed its former ruling, saying:

"There is no such crime known to our law as an assault with intent to carnally know and abuse a child under ten years of age with her consent. Smith v. The State, 12 Ohio State, 466."

O'Meara v. State of Ohio, 17 Ohio State, 516.

Smith v. The State, 12 Ohio State, 466, is the leading case on the construction of this particular statute; it was reprinted in 80 Am. Dec, 355-375,

with full notes and annotations, and was cited and added with other references to the particular Ohio Statutes, to Sections 14-19, in Carter's Codes, Alaska, in 1900, showing Congress knew of and adopted Smith v. The State, supra, when adopting the statute.

We submit, then, that this court should adopt the construction of this statute which Congress adopted when, in 1899, it adopted the Statute from Ohio.

And, if the court should follow that rule, and adopt the construction of the statute given to it by the Supreme Court of Ohio, it must now, (1) grant the rehearing applied for herein, and, (2) sustain the objection and exception which plaintiff in error made to instruction numbered XIII given by the court below, and (3) also sustain the exception to the refusal of the trial judge to give "Defendant's requested instruction No. 2," and, (4) reverse the case.

(c) Relating to Assault With Intent, and Attempt.

The Alaska Section 18, in Carter's Annotated Alaska Codes, (Sec. 1898, Compiled Laws of Alaska, 1913), shows, also, by its annotations that it was borrowed bodily from Bate's Annotated Ohio Statutes, Section 6821.

The construction thereof by the Supreme Court of Ohio, prior to its adoption by Congress in 1899,

in the Penal Code of Alaska, will be binding on all Alaska courts and upon the appellate courts.

At the December Term, 1878, of the Supreme Court of Ohio, the court decided the case of Fox v. The State of Ohio, 34 Ohio State, 377, and therein laid down the rule that assault with intent to commit rape was not equivalent to an attempt to commit rape.

The plaintiff in error in that case was indicted for rape, but on the trial the jury found him not guilty of rape, but "guilty of an attempt to commit a rape." There was no law making it a crime to "attempt to commit a rape" in Ohio except the statute of which our Alaska section 1898 is an exact copy "that whoever assaults another, with intent * * * to commit rape * * * upon the person so assaulted, shall be imprisoned," etc.

The court on that record held:

"A verdict on an indictment for rape, finding the defendant not guilty of the crime charged, but guilty of an *attempt* to commit the same, is not sufficient, under seection 5, chapter 7, title 2, of the penal code (74 Ohio L. 352), to convict the defendant of an assault with intent to commit rape."

And the court further said:

"In our opinion, the verdict having failed to respond to the whole indictment in such manner as to authorize the court below either to sentence the

accused or to order his discharge, it was the duty of the court, on its own motion, to set the verdict aside, and to order a new trial. (citations). It is therefore now ordered that the verdict be set aside, and that a new trial on the indictment be granted."

Fox v. The State, 34 Ohio State, 377.

This case is cited to show that assault with intent to commit rape, and attempt to commit rape are separate and distinct offenses; and that the Alaska section 1898 (Ohio section 14) does not embrace the crime of attempt.

(d) Lesser Crimes Included in That Charged

(e) Lesser Crimes Included in That Returned

In his instruction XI the lower court charged the jury that "a section of our statute provides that in all cases of criminal prosecutions the defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the indictment," and followed up with charging that assault with intent to commit rape, was such an included crime, but he did not instruct the jury that an attempt was an included crime, and he did not instruct the jury upon the lesser crimes included in assault with intent to commit rape—to-wit, assault and battery, assault, and attempt.

To this instruction exception was taken (page 157 Transcript) and assignment of error based thereon (page 168 Transcript) and the argument

on the error presented in brief of Plaintiff in error at pages 26-29.

On an indictment for murder in the first degree it would obviously be error for the court to instruct that manslaughter is an included crime, but to omit all mention of murder in the second degree, and withhold all reference to other included crimes from the jury as the trial court did in this case in his instruction numbered 14 (page 156 Transcript of Record.)

In this case the court below instructed fully on the crime of assault with intent to commit rape, which is *not* an included crime in that charged in the indictment, but wholly neglected and failed to charge that an attempt was an included crime. Assuming, as the court below did, that assault with intent to commit rape is an included crime, he did not instruct the jury that assault and battery, and assault, and attempt, are included in assault with intent, to rape. This error is presented with authorities in the brief of plaintiff in error at pages 26-31.

Stokes v. Territory, 14 Ariz, 242; 127 Pac. 742.

People v. Watson, 125 Cal, 342; 57 Pac. 1071.

Musgrave v. Territory, 12 Ariz. 123; 100 Pac. 440.

Territory v. Nichols, 3 N. M. 103; 2 Pac. 78.

State v. Vinsant, 49 Iowa 241.

Sections 2073 and 2074, Compiled Laws of

Alaska, 1913, provide for the punishment of attempts to commit crime in general provisions, and an attempt is an included offense, under 2269, to every substantive crime in the criminal code.

"Section 2269. That in all cases the defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit such crime."

There may be substantive statutory crimes in the Alaska Penal code which do not necessarily include another crime, except an attempt, but none can be found which does not include an attempt. For instance: Sec. 1894, under which the indictment in this case was drawn, states two separate substantive crimes,—rape, *"forcibly and against her will,"* and statutory rape on a female under sixteen, *"with her consent"*; the first of these substantive crimes contains four included crimes:—attemt, assault with intent, assault and battery, and simple assault; *the second substantive crime, rape, "with her consent," contains only the single included crime of attempt.* The court, however, instructed the jury, in effect, that the second substantive crime in the section necessarily included all the included crimes of the first.

And right there is where the court erred:

(1) *Of course, an indictment may be found*

under Section 1894 *for assault with intent to commit rape upon any female over or under* 16 *years of age, forcibly and against her will, but it must be found under the first clause of that section, and not under the second.*

(2) *If an indictment is returned for rape on any female, whether over or under the age of sixteen years, forcibly and against her will, the substantive crime charged will necessarily include the lesser crimes of assault with intent to commit rape, assault and battery, simple assault, and attempt to commit rape.*

(3) *But where the substantive crime charged in the indictment is that of statutory rape, upon a girl under sixteen years of age, with her consent, as in this case, the only lesser crime necessarily included therein is attempt; the element expressed by the words "forcibly and against her will" is wholly excluded, purposely and by the plain language and logic of the law.*

(4) *Again, the indictment in this case was correctly drawn, upon the facts as the United States Attorney had them from the prosecuting witness, under the second clause of Section* 1894; *the error in the case was committed in giving an instruction on assault with intent to commit rape, which had no application to the second, but only to the first, clause of Section* 1894, *and to the substantive crime there*

charged, and refusing an instruction pointing out the error.

(8) Demurrer to the Indictment.

The plaintiff in error on the last page of the reply brief for plaintiff in error in this case demurred to the indictment against him as follows:

"Comes now the plaintiff in error, the defendant below, by James Wickersham and J. W. Kehoe, his attorneys, and demurs to the indictment in this case, and for grounds of demurrer thereto says: (1) *that the said indictment shows upon its face that it does not state facts sufficient to constitute any crime, and* (2) *because it shows upon its face that it does not state facts sufficient to constitute the crime of assault with intent to commit rape, with which crime defendant was convicted upon said indictment."*

So that it might be noticed by the judges of the court, counsel had plainly printed in large type on the front cover, and just below the words "Reply Brief for Plaintiff in Error," the words, "Demurrer to Indictment," but it was evidently not called to the attention of the court by that notice.

Section 2207, Compiled Laws of Alaska, 1913, provides:

"Sec. 2207. That when the objections mentioned in section 2202 (2199) appear upon the face of the indictment, they can only be taken by demur-

rer, except that the objection to the jurisdiction of the court over the subject of the indictment, or that the facts stated do not constitue a crime, may be taken at the trial, under the plea of not guilty and in arrest of judgment."

This section was adopted from the laws of Oregon (See Sec. 98, Carter's Annotated Codes, Alaska, 1900): The Supreme Court of the State of Oregon in the case of State v. Mack, 20 Ore. 234; 25 Pac. 639 (decided January 6, 1891, and before its adoption by Congress for Alaska) held that under that section "the objection that the facts stated in an indictment do not constitute a crime may be taken for the first time in the appellate court, and is not waived by failing to demur or move in arrest of judgment in the trial court." In a case decided April 13, 1909, the same court in State v. Martin, 100 Pac. 1106, reaffirmed the ruling in the Mack case and said:

"Where, however, it is insisted in this court for the first time, that the facts stated in the indictment do not constitute a crime, or that the trial court did not have jurisdiction of the subject matter of the offense charged, such objections can be urged, though not assigned."

This demurrer was in time and should have been noticed by the court in its opinion.

The indictment was returned against the

plaintiff in error at Juneau, Alaska, on October 11, 1921, charging that on July 1, 1921, he "did, the said Peter Sekinoff being then and there over the age of sixteen years, knowingly, wilfully, wrongfully, unlawfully, feloniously carnally know and abuse Sonia Malachoff, the said Sonia Malachoff being then and there a female person and then and there under the age of sixteen years, to-wit, of the age of eleven years, and the said Peter Sekinoff not being then and there the husband of said Sonia Malochoff."

The indictment states in its heading that it is based on "Section 1894, C. L. A.," or Compiled Laws of Alaska, 1913, which section reads as follows:

"Sec. 1894. That whoever has carnal knowledge of a female person, forcibly and against her will, *or being sixteen years of age, carnally knows and abuses a female person under sixteen years of age, with her consent, is guilty of rape.*"

Defendant was tried on October 19-20, and the jury returned a verdict of Guilty of Assault with Intent to Commit Rape. A motion for new trial was denied and he was sentenced to serve six years in the penitentiary.

Does the indictment against Sekinoff state facts sufficient to constitute a crime as defined in the second clause of Section 1894, or facts sufficient to constitute Assault with Intent to Commit Rape,

with which he was convicted? Counsel for plaintiff in error think it does not.

In our reply brief we cited the Nevada statute and the opinion in State v. Pickett, 11 Nev. 255, 21 Am. Rep. 754, Book 35 Pacific State Reports, written by Judge Beatty, as authority that such an indictment is not good.

The Nevada Section, Rev. Laws Nevada, 1912, reads as follows:

"Section 177. Rape is the carnal knowledge of a female forcibly and against her will * * * and any person of the age of sixteen years or upwards who shall have carnal knowledge of any female echild under the age of sixteen years, either with or without her consent, shall be adjudged guilty of the crime of rape, and be punished as before provided."

So far as we can ascertain that was the Nevada statute when the Pickett case arose: State v. Pickett, 11 Nev. 255; 21 Am. Rep. 754; Book 35 Pacific State Reports.

In that case as in this the trial court instructed the jury upon the elements of the crime of rape and then added:

"But if the jury believe that the defendant attempted to commit a rape and failed to effect a penetration, as above described, they should find a verdict of guilty of an assault with the intent to com-

mit rape."

The Supreme Court of Nevada held that instruction to be error, and reversed the case therefor, and said:

"The common law definition of rape is "the carnal knowledge of a woman forcibly and against her will," (4 Blacks, Com. 210). The same definition is adopted by our statute (Comp. Laws, Sec. 2350). Under this definition an assault is a necessary ingredient of every rape, or attempted rape. But it is not a necessary ingredient of the crime of carnally knowing a child under the age of twelve years, with or without her consent, which is defined in the latter part of the section, and which is called "rape." It is obvious that here are two crimes differing essentially in their nature, though called by the same name. To one force and resistance are essential ingredients, while to the other they are not essential; they may be present or absent without affecting the criminality of the fact of carnal knowledge. An assault implies force and resistance. The crime last defined may be committed, or at least attempted, without an assault, if there is actual consent on the part of the female."

State v. Pickett, supra.

And the same general principles are laid down in the case of Smith v. The State, 12 Ohio State, 466.

Alaska Section 1894 clearly defines two crimes,

as do the Ohio and Nevada Statutes, and its provisions, if carefully analyzed and understood, are logical and easily applied to the long established principles of law relating to the crime of rape.

The crime charged in the first clause of Section 1894, Alaska, is the old common law definition of rape, and an indictment must charge every element therein or it will be bad on demurrer.

The second clause charges the crime commonly known as statutory rape. The substantive crime charged in the second clause consists of four distinct elements, each of which, under the rules of law, must be affirmatively charged and averred in the indictment, and the fact proved on the trial, to secure legal conviction. These four elements are:

1. The defendant must be sixteen years old, or older,

2. He must carnally know and abuse a female person,

3. Under sixteen years of age,

4. WITH HER CONSENT.

If either of these necessary elements is lacking in the charging part of the indictment, it will not state facts sufficient to charge the crime; if the prosecution fails to prove either, the court should direct a verdict for the defendant.

The indictment in this case charges, (1) that defendant was "then and there over the age of six-

teen years," (2) that he did "carnally know and abuse, a female person," (3) "then and there under the age of sixteen years."

Now it is clear that this indictment does not attempt to charge the common law rape, for it does not allege that the act was done "forcibly and against her will." Nor does it charge statutory rape, for it does not charge that it was "with her consent." The intent of Congress in enacting the second clause of the section is clear and does not need construction. Without the act denounced in the second clause of the section is committed "with her consent" of the female, it does not charge the crime defined in the second clause. The indictment in this case does not aver that the alleged offense was committed "forcibly and against her will." It is not a good indictment, therefore, under the first clause of Sec. 1894; it does not aver that it was committed "with her consent"—it is silent on the subject of force and violence,—it may be the facts will disclose force and violence—and if so it would be bad under the second clause. How can there be certainty of averment, and how can the defendant be advised of the charge, of what proof he must meet or be ready to present, if the indictment does not aver that it was "with her consent." "With her consent" is as essential an element of the crime, under the second clause, as "forcibly and against her will" is under

the first clause. No body will pretend that an indictment under the first clause which did not aver that the rape charged was "forcibly and against her will" would be good against demurrer, and we think the rule is equally sound that the indictment under the second clause must aver that the crime there charged was committed "with her consent."

The indictment at bar does not charge that it was "forcibly and against her will," nor does it aver that it was "with her consent." Now we respectfully suggest to the court that no one can guess which clause it is attempted to be drawn under.

We think it does not state facts sufficient to constitute the crime charged in the second clause of Section 1894.

Does the indictment state facts sufficient to constitute the crime with which defendant was found guilty, to-wit, Assault with Intent to Commit rape?

What character of rape? Why the rape charged in the first paragraph of Section 1894, for that is the only rape defined by our Section 1898, which, as we have shown, was borrowed from Bate's Ann. Statutes of Ohio, Section 6821.

Our Section 14, Carter's Codes, Sec. 1898, Comp. L. Alaska, 1913, Bates Ann. Stat. Ohio, Sec. 6821, read as follows:

"Section 1898. That whoever assaults another

with intent * * * to commit rape * * * upon the person so assaulted, shall be imprisoned," etc.

The elements of such a crime have been so often defined that one may be brief. The charge imports "force and violence," and intent with force and violence to assault and rape. The cases of Smith v. The State, 12 Ohio State 466, and State v. Pickett, 11 Nev. 255, clearly point out that the statutory rape charged in the second clause of Section 1894, Alaska, lacks almost every element contained in the crime of "Assault with Intent to Commit Rape." We submit, on the authority of those two cases, and the apparent lack of the elements charged in the indictment against the defendant, that the indictment does not state facts sufficient to constitute the crime of Assault with Intent to Commit Rape, and our demurrer ought to be sustained against it on that ground.

(9) Insufficiency of the Evidence to Justify the Verdict and that the Verdict is Against the Law

In the first paragraph of its opinion this court disposed of all our objections on the insufficiency of the evidence to justify the verdict by saying that as to the hearsay statements offered on the trial by two witnesses, there was no assignment of error covering the same, and no objection taken thereto, "and as a matter of course there could have been no ruling

or exception regarding the matter."

That is correct, of course, as to the mere matter of the hearsay feature of the statements made by the two witnesses mentioned, but our argument on their statements went, or we intended it to go, to the general objection that there was "an insufficiency of the evidence to justify the verdict,"—it was a demurrer to the whole evidence, and the discussion of the hearsay feature was only one part of the argument.

A general challenge was made to the sufficiency of the evidence to justify the verdict in our motion for a new trial (page 157 Transcript of Record), an assignment of error was made to the court's action in denying it (page 174 Transcript of Record) in our XI assignment of error, and it was presented to this court, pages 7-14 in our Brief and Argument.

We understand that is sufficient to raise the objection that there was not sufficient evidence to justify the court in submitting the case to he jury—that thereby it constituted a general demurrer to the evidence. It was upon that broad theory that counsel presented this objection to the evidence, and it was not the intention to limit the objection to the hearsay feature alone. Hearsay statements, pure and simple, are not evidence, and do not justify a jury in finding a verdict against a defendant, even

though no objection is made, or ruling asked for, or exception taken; the objection can be raised, as it was in this case, in the trial court, on the general objection that there is no evidence to justify the verdict. It amounts to a failure of proof, and we submit it was fairly raised by our motion for a new trial, and excepted to, and assigned for error, and presented to this court in our brief—on that theory.

We frankly submit to this court:

1. That the second clause of section 1894, Alaska, by its clear and positive provisions, excludes from the elements of the crime defined therein every element of force and violence from which an assault with intent may be found or inferred.

2. That the indictment in this case was attempted to be drawn under that clause and does not charge or aver any fact upon which force or violence, or assault with intent, can be based or inferred.

3. That the testimony in this case does not contain any evidence tending to prove the use of any force or violence, or any assault with intent, or otherwise, directly or by inference.

4. That the instruction on assault given by the trial judge was not given to meet any definition of the statute, or any charge of the indictment, or any proofs offered on the trial, but by *mistake* in reference to the element of attempt.

Upon the whole record, then, we petition this court to grant a rehearing and reargument of the case, and at that time we shall offer for reargument the following

ERRORS OF THE LOWER COURT:

1. In holding that the crime of *attempt* to commit the crime of statutory rape was *not* necessarily included in the crime charged in the indictment.

2. In withdrawing that offense from any consideration by the jury by his instruction number 14.

3. In instructing the jury that the crime of assault with intent to commit rape was necessarily included in the crime charged in the indictment.

4. In refusing to give "defendant's requseted instruction number 2," and in refusing to instruct the jury as therein requested.

5. And, if the court shall take the view that the court below was correct in its instructions number 11 and 13, and that assault with intent to commit rape was and is necessarily included in the crime charged in the indictment, then the lower court erred in not giving full instructions to the jury in relation to the lesser crimes necessarily included in assault with intent to commit rape, to-wit, assault and battery, and simple assault.

6. The lower court erred in submitting the case to the jury, and in accepting its verdict and sen-

tencing the defendant, first, because the evidence was not sufficient to justify the verdict, and, second, because the indictment shows upon its face that it does not state facts sufficient to constitute any crime, and, third, because the indictment shows upon its face that it does not state facts sufficient to constitute the crime of assault with intent to commit rape, with which crime the defendant was convicted upon said indictment.

Wherefore, and for other reasons appearing in petitioner's briefs heretofore filed in this cause, petitioner respectfully urges that a rehearing may be granted and that the mandate of this court may be stayed pending the disposition of this petition.

That upon said rehearing, if granted, the cause be set for reargument at the term of this court late in November so that counsel for parties can be present for oral argument.

Respectfully submitted,

PETER SEKINOFF, by

Wickersham & Kehoe,
Attorneys for Petitioner.

I, James Wickersham, an attorney regularly admitted to practice in the United States Circuit Court of Appeals for the Ninth Circuit, do certify that in my opinion the foregoing Petition for Rehearing in the case of Peter Sekinoff, plaintiff in error, against the United States of America, defendant in error, No. 3808, is well founded and is not interposed for delay.

James Wickersham

Attorney for Plaintiff in Error

Dated at Juneau, Alaska,
August 24th, 1922.

No. 3845

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

JAMES C. DAVIS, as Director General of Railroads, Operating the Chicago, Milwaukee & St. Paul Railway and Agent Appointed Under the Transportation Acts of 1920,

Plaintiff in Error,

vs.

AMERICAN SILK SPINNING COMPANY, a Corporation,

Defendant in Error.

VOLUME I.

(Pages 1 to 384, Inclusive.)

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorney for Defendant in Error. [1*]

In the Southern District of the United States for the Western District of Washington, Southern Division.

2905.

AMERICAN SILK SPINNING COMPANY,

Plaintiff,

vs.

DIRECTOR GENERAL OF RAILROADS (Operating Chicago, Milwaukee & St. Paul Railway),

Defendant.

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*Page-number appearing at foot of page of original certified Transcript of Record.

Complaint.

Comes now the plaintiff herein and complains and alleges as follows:

FIRST: That the plaintiff at all the times herein mentioned was and still is a corporation organized and existing under the Laws of the State of Rhode Island, with its principal place of business at the City of Providence, in said State, and is a citizen of said State.

SECOND: That the defendant at all the times herein mentioned was and still is the Director General of Railroads duly appointed, and acting under and by virtue of an Act of Congress, and at all the times herein mentioned was and still is operating as a common carrier of freight and passengers the railroad lines of the Chicago, Milwaukee & St. Paul Railway Company between the Cities of Seattle and Tacoma, Washington, and the City of Chicago, Illinois. That the Chicago, Milwaukee & St. Paul Railway Company at the times herein mentioned was and still is a corporation organized and existing under the Laws of the State of Wisconsin and is a citizen of said State. [2]

THIRD: That during the month of June, 1918 the plaintiff caused to be shipped, freight prepaid, from Canton, China, 1,000 bales of waste silk of which 700 bales were consigned to the order of Messrs. Heidelbach, Ickelheimer & Co., New York, and 300 bales to Goldman, Sachs & Co., New York, all destined to plaintiff American Silk Spinning Company at Providence, Rhode Island, and upon

delivery to and receipt of said silk at Canton, China, by Osaka Shosen Kaisha, Ltd., in good order and condition, said Osaka Shosen Kaisha, Ltd., on behalf of itself, separately and as a duly authorized agent of the defendant operating lines of railroad as aforesaid, did jointly execute and deliver four certain through Trans Pacific and Overland Bills of Lading covering the transportation of said bales of silk from Canton, China, to Providence, Rhode Island, and consigned and destined as aforesaid. That by the terms of said bills of lading said silk was to be carried by said Osaka Shosen Kaisha, Ltd., from Canton, China, to Seattle or Tacoma, Washington, on its steamship "Canada Maru" and there delivered to the defendant to be carried by defendant over the lines of the Chicago, Milwaukee & St. Paul Railway Company, and other lines of railroad connecting therewith to the destination named in said bills of lading, to wit, Providence, Rhode Island, and there delivered to the plaintiff. That said consignees named in said bills of lading did for a valuable consideration and prior to the arrival of said silk at Tacoma, Washington, endorse said bills of lading to the plaintiff, and the plaintiff thereupon became the owner of said bills of lading and the said silk and became entitled to the delivery of said silk as provided in said bills of lading. That said bills of lading were numbered, dated and covered the [3] bales as follows:

B/L No. 8 dated June 21, 1918, 300 bales
B/L No. 9 dated June 21, 1918, 200 bales

B/L No. 10 dated June 24, 1918, 200 bales
B/L No. 11 dated June 24, 1918, 300 bales

FOURTH: That during the time the said silk was in course of transportation on said S/S. "Canada Maru" under the said bills of lading 867 bales of said silk became wet from contact with salt water. That upon arrival of said S/S. "Canada Maru" at Tacoma, Washington, during the month of August, 1918, the said 1,000 bales of silk were discharged from the S/S. "Canada Maru" and delivered into the possession of defendant for transportation to destination as aforesaid under and in pursuance of the terms of the said bills of lading. That defendant accepted all of said silk for transportation and in consideration of the freight prepaid to his agent as aforesaid, and of further freight and charges to be paid by plaintiff, the defendant agreed to transport the wet silk to destination by silk or passenger train service in refrigerator-cars as aforesaid. That 133 bales of said silk were dry and were in due course transported by defendant to their destination, but that the defendant after accepting the said 867 bales of wet silk for transportation failed and refused to transport said bales of wet silk to their destination but demanded that said bales be dried and reconditioned before defendant transported same to destination, all contrary to the terms and requirements of his contract of carriage aforesaid.

FIFTH: That plaintiff in order to have said wet silk transported to destination and without waiving or relinquishing any of its rights in the prem-

ises did cause said wet silk to be treated and reconditioned as required and demanded by the defendant and thereby incurred an expense of $5,000. That after said silk had been dried and reconditioned as aforesaid the defendant transported the same to destination and there delivered the same to the plaintiff. [4]

SIXTH: That as the natural and proximate result of the drying and reconditioning of said wet silk the colors of said silk became fixed and permanent and the silk was otherwise damaged and the delivery of the same at destination was greatly delayed thereby causing great loss and damage to plaintiff. That by reason of the wrongful failure and refusal of the defendant to transport said silk in the condition in which defendant accepted the same for transportation and agreed to transport the same as aforesaid, the plaintiff has been damaged in the sum of $100,622.75 in addition to the sum of $5,000 expended by the plaintiff in drying and reconditioning the said silk making a total damage to the plaintiff of $105,622.90. That the defendant has wholly failed and refused to pay to the plaintiff, any part of said sum although demand therefor has been made.

WHEREFORE plaintiff prays for judgment against the defendant in the sum of $105,622.90, together with interest thereon at the legal rate from the 15th day of August, 1918, together with its costs and disbursements herein, and for such other

and further relief as it may be entitled to receive in the premises.

BALLINGER, BATTLE, HULBERT & SHORTS,

Attorneys for Plaintiff. [5]

State of Washington,
County of King,—ss.

Bruce C. Shorts, being first duly sworn on oath deposes and says: That he is one of the attorneys for the American Silk Spinning Company, a corporation, and that he makes this affidavit and verification for and on behalf of said plaintiff corporation, for the reason that the same is a foreign corporation, and that affiant is familiar with the facts in the case. Affiant states that he has read the foregoing complaint, knows the contents thereof and upon oath swears that the same is true and correct.

BRUCE C. SHORTS,

Subscribed and sworn to before me this 25th day of February, 1920.

R. G. DENNEY,
Notary Public in and for the State of Washington, Residing at Seattle.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Feb. 26, 1920. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [6]

In the United States District Court for the Western District of Washington, Southern Division.

No. 2905.

AMERICAN SILK SPINNING COMPANY,
Plaintiff,

vs.

DIRECTOR GENERAL OF RAILROADS (Operating Chicago, Milwaukee & St. Paul Railway),
Defendant.

Plea in Abatement and Answer.

COMES NOW the defendant, and, not waiving any right to controvert the sufficiency or truth of the allegations contained in the plaintiff's complaint when an issue shall be tendered by a party having a valid and subsisting interest in the subject matter of this act, defends on the ground that the above-named plaintiff is not the real party in interest and that it has no right to maintain this action.

As grounds for abatement of this action, the defendant alleges:

1. That the damage to the merchandise constituting the plaintiff's alleged cause of action herein occurred while said merchandise was in transit from Hong Kong, China, by way of Tacoma or Seattle to Providence, Rhode Island, and was insured against loss or damage while so in transit, by

the Atlantic Insurance Company of New York in the State of New York.

2. That the plaintiff has received from said Insurance corporation full compensation for all damage to said merchandise which occurred while the same was in transit as aforesaid. [7]

3. That the bill of lading contracts, and each of them, referred to in plaintiff's complaint, under which the said merchandise moved in transit, as aforesaid, contain a stipulation applicable to the part of the transportation service undertaken and performed by this defendant, which is as follows:

> "Any carrier or party liable on account of loss or damage to any of said property shall, by right of subrogation, have the full benefit of any insurance that may have been effected on or on account of said property."

4. That the plaintiff, as a mere volunteer and in collusion with said Atlantic Insurance Company of New York, in the State of New York, commenced and now prosecutes this action for the sole benefit of said insurer, and if a judgment for any amount of money should be rendered herein against this defendant, the same would inure to said insurer, the Atlantic Insurance Company.

WHEREFORE, this defendant prays to be hence dismissed and for judgment against said plaintiff for costs.

Without waiving his plea in abatement and always insisting upon the same, the defendant, by way of answer to the complaint of the plaintiff herein, alleges as follows:

I.

1. Answering the first and second paragraphs of said complaint, the defendant admits the truth of the allegations therein contained.

2. Answering the third paragraph of said complaint, the defendant admits each and every allegation therein contained, except that he denies that he has any knowledge or information sufficient to form a belief with respect to the assignments [8] of the bills of lading and transfer of ownership therein alleged, and demands that said allegations be proved.

3. Answering the fourth paragraph of said complaint, the defendant denies each and every allegation and the whole thereof, except the following allegations therein, which are admitted to be true:

> "That during the time the said silk was in course of transportation on said steamship 'Canada Maru,' under the said bills of lading, 867 bales of said silk became wet from contact with salt water. That upon arrival of said steamship 'Canada Maru' at Tacoma, Washington, during the month of August, 1918, the said 1000 bales of silk were discharged from the steamship 'Canada Maru.' * * * That 133 bales of said silk were dry and were in due course transported by the defendant to their destination."

And the defendant admits refusal on his part to transport the wet bales of waste silk while the same were in the condition existing at the time

when the same were at first offered for transportation.

4. Referring to the fifth paragraph of said complaint, defendant denies that he has any knowledge or information sufficient to form a belief, with reference to the amount of expense, if any, incurred by the reconditioning of said wet bales of waste silk. The defendant admits that, in order to have said wet silk transported, the same was dried, and admits that after having been dried, the said silk was transported by the defendant to destination and there delivered the same to the plaintiff. The defendant denies each and every other allegation and insinuation contained in said paragraph.

5. Answering the sixth paragraph of said complaint, the defendant admits that he has refused to pay any of the alleged damages, and he denies each and every other allegation and insinuation contained in said paragraph. [9]

II.

Further answering said complaint and for a first affirmative defense, the defendant alleges as follows:

1. That the bill of lading contracts alleged and referred to in said complaint each contain a condition applicable to the part of the transportation service from Seattle or Tacoma to destination of the following tenor:

> "Except in the case of negligence of the carriers or party in possession (and the burden to prove freedom from such negligence shall be

on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage or delay occurring while the property described herein is stopped and held in transit upon request of the shipper, owner or party entitled to make such request, or resulting from a defect or vice in the property, or from riots or strikes."

2. That while the 1000 bales of silk aforesaid were in transit on board of the steamship "Canada Maru," the said vessel, by a marine disaster, was seriously injured so that she took into her hold and cargo space in which 867 of said bales of waste silk were stored, great quantities of sea water, whereby all of said 867 bales were submerged, and, when discharged from said vessel at Tacoma, were completely saturated with salt water, which caused the generation of heat and ammoniacal fumes within said bales and the deterioration and decay of said waste silk.

3. That when said 867 bales of waste silk were tendered to the defendant for transportation, the said bales were wet, hot, rapidly deteriorating by reason of the salt water germs which accumulated therein, and dangerous to handle because of the fumes emanating therefrom, and, because of said conditions and the probability of spontaneous combustion, the said bales were unfit for transportation for the long distance required for the delivery at Providence in the State of Rhode Island; and, solely for that [10] reason, the defendant refused to accept said 867 bales for transportation

under the said bills of lading and the tariffs relating thereto while the said bales were in such unfit condition.

4. That the only delay in performing the transportation service, pursuant to the contracts contained in said bills of lading, occurring subsequent to the unloading of said waste silk from the steamship "Canada Maru," was due to the necessary and unavoidable stoppage of said property in transit because of the aforesaid defect and vice in said property; and whatever damage to said property occurred while the same was in transit, the same was caused by the marine disaster aforesaid and not by any act or default of the defendant.

II.

Further answering said complaint and for a second affirmative defence thereto, the defendant alleges as follows:

1. That each of the bill of lading contracts alleged in said complaint contain a condition applicable to the part of the transportation service of said waste silk from Seattle or Tacoma to destination, which condition is of the following tenor:

> "Any carrier or party liable on account of loss or damage to any of said property, shall, by right of subrogation, have the full benefit of any insurance that may have been effected on or on account of said property."

2. That the Atlantic Mutual Insurance Company of New York in the State of New York, a corporation, by a policy, or by several policies, issued by it, insured all of the 867 bales of waste silk for

which damages are sued for herein, for the full value [11] thereof, in favor of the consignee or consignees or owner or owners thereof, against loss of, or damage to, said property occurring during the time of transportation thereof pursuant to said bills of lading. Said policy or policies are not, and have not been, in defendant's possession, and defendant is unable to describe the same or to state the terms or provisions thereof with greater particularity, but the plaintiff is fully informed with respect to said insurance.

3. That the plaintiff has received from said insurer the amount of money payable under said policy or policies and thereby has been fully compensated for all damages to said 867 bales; and, by receiving said money, the plaintiff has deprived the defendant of all right by subrogation to be reimbursed for payment of the damages sued for herein and enforcible in any action or proceeding against said insurer, which right would inure to the defendant, upon such payment of damages, by force and virtue of the condition aforesaid in said bill of lading contracts, if the plaintiff had not received the compensation aforesaid.

III.

Further answering said complaint and for a third affirmative defence thereto, the defendant alleges:

That when the said wet bales of waste silk were first offered to the defendant, to be transported under the bills of lading referred to in the complaint, the defendant examined and inspected the said bales in the customary way that freight is

usually examined by well regulated railroads when tendered for carriage, and, from such examination, it reasonably appeared to the defendant that there was great danger and risk of injury to persons [12] and property, and great likelihood of further damage to said silk, if the said silk were transported to destination in the manner and with the facilities demanded by the said bills of lading and the tariffs in force relating to the transportation of silk.

That immediately after said examination, the defendant orally notified the plaintiff that he had made such examination and of the dangerous and unfit condition in which the said wet silk then appeared to the defendant to be, and that the defendant would not accept the said wet silk for shipment because of the then unfit and dangerous condition of the silk as disclosed by defendant's said examination; that, in response to said notice and refusal to accept, the plaintiff, after personal examination of the wet bales of silk, proposed to the defendant that a further examination and inspection of the wet silk should be made by a competent cargo surveyor and inspector in the manner in which such surveyors or inspectors usually examine cargoes for shipment, in order to determine whether or not the said wet silk was unfit for transportation or subject to further damage or deterioration, if forwarded to destination in the manner and with the facilities demanded by the terms of the said bills of lading and the tariffs governing the shipment of silk, and that, if said surveyor or in-

spector, after such examination, was of the opinion that there was danger or risk in transporting the wet silk in the condition in which it was first offered for shipment, by the means and facilities demanded by said bills of lading, the plaintiff would accept his judgment and opinion as final and the defendant would then be relieved from all further obligation to accept and transport the wet silk in that condition in which it was when first offered for shipment.

That, acting upon said proposal, the plaintiff and the defendant selected one J. Ayton, a cargo surveyor, Lloyds' Agents, of Seattle, to make the examination and inspection aforesaid, and [13] said surveyor at once proceeded to make said examination, and upon completing the same, reported to the plaintiff and the defendant in writing his conclusions as follows:

> "On examination of the same (wet bales of silk) I found the bales in a very wet, soaky condition, quite warm and heating, so much so some of them were quite hot. These were piled three high outside in the open air, so if the stuff will heat from being piled in this way, what would it do if it was loaded and piled in a closed car; therefore, I am of the opinion there is a great risk in shipping this in the condition it is in."

That, acting upon the said report, the plaintiff took immediate possession of all the wet bales of silk and withdrew them from the place where they were offered for shipment, had them transported

to Seattle, where the plaintiff, of its own accord and without any act of the defendant, had the said silk dried; and the plaintiff, at the time it had the said silk dried, knew, or should have known, that, by such process and treatment, the very damage complained of would occur, and, having such knowledge or the means of knowing the fact, the plaintiff became a party to said wrongful act of which complaint is made and cannot profit thereby; and the defendant, acting upon the said report and upon the conduct of the plaintiff in taking possession of said wet bales of silk and withdrawing them as aforesaid, made no further attempt to examine the same or to determine their fitness for shipment, or to learn what was being done with the same by the plaintiff and gave said shipment no further consideration; and, by plaintiff's said acts, the defendant was misled and was deprived of the right and opportunity to avoid the very claims and charges now asserted against the defendant in the complaint.

That, by reason of the foregoing, the plaintiff is now denied the right to assert or to prove any of the acts charged in the complaint against the defendant upon which the right to recover [14] damages is founded.

WHEREFORE, and by reason of all the foregoing affirmative defenses and other matters set forth herein, the defendant prays that said action be dismissed and that the defendant have judgment

against the plaintiff for all costs and disbursements incurred herein.

GEO. W. KORTE,
H. S. GRIGGS,
Attorneys for Defendant,
608 White Building,
Seattle, Wash.

State of Washington,
County of King,—ss.

Geo. W. Korte, being first duly sworn, on oath deposes and says:

That he is the attorney for the defendant and makes this verification because the said defendant does not reside, and is not now in the State of Washington; that affiant has read the foregoing plea in abatement and answer and that the statements and allegations therein contained are true as he verily believes.

GEO. W. KORTE.

Subscribed and sworn to before me, this 8th day of June, 1920.

[Seal of Notary] W. C. MUMFORD,
Notary Public in and for the State of Washington,
Residing at Seattle Therein.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. June 12, 1920. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [15]

In the Southern District of the United States for the Western District of Washington, Southern Division.

No. 2905.

AMERICAN SILK SPINNING COMPANY,
Plaintiff,

vs.

DIRECTOR GENERAL OF RAILROADS, (Operating Chicago, Milwaukee & St. Paul Railway),
Defendant.

Reply.

Comes now the plaintiff and for its reply to defendant's plea in abatement and answer herein alleges as follows:

I.

It denies that the merchandise referred to in paragraph I of the plea in abatement was insured by the Atlantic Insurance Company of New York, and alleges that said merchandise was insured by the Atlantic Mutual Insurance Company.

II.

It denies each and every allegation contained in the second paragraph of said plea in abatement.

III.

Replying to the allegations in paragraph III of said plea in abatement, plaintiff admits that the bills of lading contain the clause therein quoted, and denies each and every other allegation in said paragraph set forth.

IV.

Replying to paragraph IV of said plea in abatement, plaintiff denies each and every allegation therein set forth. [16]

For reply to the first affirmative defense set forth in said plea in abatement and answer, plaintiff admits, denies and alleges as follows:

I.

Plaintiff admits that the bills of lading contain the clause therein quoted and denies each and every other allegation in said first paragraph set forth.

II.

Replying to the allegations of paragraph II of said first affirmative defense, plaintiff admits said allegations except that it denies on information and belief that the wetting of the 867 bales of silk caused generation of heat and ammoniacal fumes within said bales and the deterioration and decay of said waste silk.

III.

Replying to paragraph IV of said first affiirmative defense, plaintiff denies each and every allegation therein set forth, except that it admits that when said 867 bales of silk were tendered to and accepted by the defendant for transportation the said bales were wet, and except further that it denies any knowledge or information sufficient to form a belief as to the reasons for defendant's refusal to transport said silk.

IV.

Replying to paragraph IV of said first affirmative

defense, plaintiff denies each and every allegation therein set forth.

And for reply to the allegations set forth in defendant's second affirmative defense, plaintiff admits, denies and alleges as follows: [17]

I.

Replying to paragraph one of said second affirmative defense, plaintiff admits that the bills of lading contain the clause therein quoted and denies each and every other allegation therein set forth.

II.

Replying to the allegations of paragraph II of said second affirmative defense, plaintiff admits that the 867 bales of waste silk were insured by the Atlantic Mutual Insurance Company of New York in favor of the consignee or consignees or owner or owners thereof against loss of or damage to said property occurring during the time of transportation thereof under said bills of lading, and plaintiff denies each and every other allegation in said paragraph II set forth.

III.

Replying to paragraph III of said second affirmative defense, plaintiff denies each and every allegation therein contained, and alleges that plaintiff has received a sum of money from said insurer solely as a loan and not in payment of any claim or claims against said insurer arising out of said insurance.

For reply to the allegations set forth in the third affirmative defense of defendant's answer, plaintiff admits, denies and alleges as follows:

I.

Plaintiff denies it has any knowledge or information sufficient to form a belief as to the matters alleged in the first paragraph of said third affirmative defense, therefore it denies the same. [18]

II.

And for reply to all other allegations set forth in said third affirmative defense, plaintiff denies the same on information and belief, except plaintiff admits that the Cargo Surveyor from Lloyds' Agents of Seattle examined the wet bales of silk after same had been accepted for transportation by the defendant and after defendant had refused to transport the same according to its agreement as alleged in the fourth paragraph of plaintiff's complaint, and further plaintiff admits that it caused said wet silk to be treated and reconditioned, but only for the reasons and causes and under the circumstances alleged in paragraphs IV and V of its complaint herein.

WHEREFORE, having fully replied to defendant's plea in abatement and answer herein, plaintiff prays for judgment against the defendant as demanded in plaintiff's complaint.

BALLINGER, BATTLE, HULBERT & SHORTS,

Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

Bruce C. Shorts, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the American Silk Spinning Company, a cor-

poration, and that he makes this affidavit and verification for and on behalf of said plaintiff corporation, for the reason that the same is a foreign corporation, and that affiant is familiar with the facts in the case. Affiant states that he has read the foregoing reply, knows the contents thereof and upon oath swears that the same is true and correct.

BRUCE C. SHORTS.

Subscribed and sworn to before me this 2d day of August, 1920.

R. G. DENNEY,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 30, 1920. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [19]

United States District Court, Western District of Washington, Southern Division.

No. 2905.

AMERICAN SILK SPINNING COMPANY,
Plaintiff,

vs.

DIRECTOR GENERAL OF RAILROADS (Operating Chicago, Milwaukee & St. Paul Railway),
Defendant.

Stipulation Re Fixing Date and Place of Trial.

It is hereby stipulated between the attorneys of record for plaintiff and defendant, undersigned, that for the greater convenience of counsel and witnesses and for the purpose of saving witnesses' time, expenses and costs, the above-entitled cause may be tried at the United States District Courthouse in Seattle, Washington, beginning October 25th, 1921.

BALLINGER, BATTLE, HULBERT & SHORTS,

Attorneys for Plaintiff.

GEO. W. KORTE,

Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 13, 1921. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [20]

United States District Court, Western District of Washington, Southern Division.

No. 2905.

AMERICAN SILK SPINNING COMPANY,

Plaintiff,

vs.

DIRECTOR GENERAL OF RAILROADS (Operating Chicago, Milwaukee & St. Paul Railway),

Defendant.

Stipulation Waiving Jury.

We, the attorneys of record for the respective parties, hereby waive the trial to the jury of this cause, and agree to submit the same to the Court without the intervention of a jury.

Dated October 7, 1921.

BALLINGER, BATTLE, HULBERT and SHORTS,

Attorneys for Plaintiff.

GEO. W. KORTE,

H. S. GRIGGS,

Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 13, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [21]

JOURNAL ENTRY OF FIRST DAY'S RECORD OF TRIAL.

At a session of the United States *District for* the Western District of Washington, held, by stipulation of counsel in this certain cause, at Seattle, in the Northern Division of said District, the Honorable ROBERT S. BEAN, U. S. District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the journal of said U. S. District Court at Tacoma, in the Southern Division, as follows:

No. 2905.

AMERICAN SILK SPINNING COMPANY

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.

Record of Trial.

This cause comes on this 26th day of October, 1921, for trial in Seattle, Bruce M. Shorts and J. M. Richardson Lyeth for plaintiff, and the defendant company represented by Geo. W. Korte and C. H. Hanford. Statement of the case is made by counsel for both sides, and the cause proceeds with the introduction of evidence both oral and documentary, the following being called, sworn and testifying on behalf of plaintiff: 1, Frank G. Taylor; Charles H. Weldon. Plaintiff's Exhibits Nos. 1–A, 2–A, 3–A, 4–A, 5–A; 2, 6–A, 7–A, 10, 11, 12, 13, 14, 15, 16, 17, are introduced, whereupon the hour of adjournment being reached, this cause is continued to October 27, 1921. [22]

In the United States District Court for the Western District of Washington, Southern Division.

AMERICAN SILK SPINNING COMPANY,

Plaintiff,

vs.

DIRECTOR GENERAL OF RAILROADS (Operating Chicago, Milwaukee & St. Paul Railway),

Defendant.

Findings of Fact and Conclusions of Law.

This cause came on regularly for hearing in October, 1921, before the undersigned Judge of the United States District Court, sitting by special assignment, the plaintiff appearing by its attorneys, J. M. Richardson Lyeth, Esq., and Bruce C. Shorts of the firm of Ballinger, Battle, Hulbert & Shorts; and the defendant appearing by its attorneys, George W. Korte, Esq., and C. H. Hanford, Esq., and thereupon by stipulation in writing signed by the parties, jury trial was waived.

And now at this time, the Court having duly considered the pleadings, evidence and arguments of counsel, finds the facts in the case to be as follows:

I.

That the plaintiff at all the times hereinafter mentioned was and still is a corporation organized and existing under the laws of the State of Rhode Island, with its principal place of business in the City of Providence in said State, and is a citizen of said state.

II.

That the defendant at all times herein mentioned was the United States Director General of Railroads [23] duly appointed and acting under and by virtue of an Act of Congress and at all times herein mentioned was operating as a common carrier of freight and passengers the railroad lines of the Chicago, Milwaukee & St. Paul Railway Company between the Cities of Seattle and Tacoma, Washington, and the City of Chicago, Illinois.

That the Chicago, Milwaukee & St. Paul Railway Company at the times herein mentioned was and still is a corporation organized and Existing under the laws of the State of Wisconsin, and is a citizen of said state.

III.

That on June 21st and 24th, 1918, the plaintiff caused to be shipped, freight prepaid, from Canton, China, 1000 bales of waste silk, of which 700 bales were consigned to the order of Messrs. Heidelbach, Ickelheimer & Co., of New York, and 300 bales to Goldman, Sachs & Co., New York, all destined to plaintiff, American Silk Spinning Company at Providence, Rhode Island. That 500 bales were of the quality known as "No. 1 Canton Steam Waste Silk" and 500 bales were of the quality known as "No. 2 Canton Steam Waste Silk."

IV.

That the said 1000 bales of waste silk were delivered at Canton, China, to Osaka Shosen Kaisha, Ltd., and upon delivery to and receipt of said bales in good order and condition, said Osak Shosen Kaisha, Ltd., on behalf of itself, separately and as a duly authorized agent of the defendant operating lines of railroad, as aforesaid, did jointly execute and deliver four certain through Trans-Pacific and Overland Bills of Lading [24] covering the transportation of said 1000 bales of waste silk from Canton, China, to Providence, Rhode Island, and consigned and destined as aforesaid.

V.

That by the terms of said bills of lading said

waste silk was to be carried by said Osaka Shosen Kaisha, Ltd., from Canton, China, to Seattle, or Tacoma, Washington, on its steamship "Canada Maru" and there delivered to the defendant to be carried by the defendant over the lines of the Chicago, Milwaukee & St. Paul Railway Company and other lines of railroad connecting therewith to the destination named in said bills of lading, to wit, Providence, Rhode Island, and there delivered to the order of said consignee.

VI.

That said goods were purchased by the plaintiff of the manufacturer in China on four months letters of credit from date of shipment, issued by the consignee banks, and on August 7, 1918, and prior to the arrival of the goods at Tacoma, the consignee banks without receiving immediate payment of the purchase price, endorsed and delivered the bills of lading to the plaintiff, and plaintiff subsequently paid the drafts which had been guaranteed by letters of credit issued by the consignee banks, when the same became due.

VII.

That said bills of lading were numbered, dated and covered the said 1000 bales of waste silk as follows:

B/L No. 8 dated June 21, 1918, 300 bales.

B/L No. 9 dated June 21, 1918, 200 bales.

B/L No. 10 dated June 24, 1918, 200 bales.

B/L No. 11 dated June 24, 1918, 300 bales [25]

That each *each* of said bills of lading contained stipulations of the following tenor: "Any car-

rier or party liable on account of loss of or damages to any part of said property shall have the right of subrogation for the full benefit of any insurance that may have been effected upon or on account of said property."

"Except in the case of negligence in the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession) the carrier or party in possession shall not be liable for loss, damage or delay occurring while the property described herein is stopped and held in transit upon request of the shipper, owner or party entitled to make such request: or resulting from a defect or vice in the property, or from riots or strikes."

That at the time the bills of lading were issued freight from the through service was prepaid at the tariff rates as to the railroad service prescribed in the Tariff previously filed with the Interstate Commerce Commissioner and then in effect.

VIII.

That on July 30, 1918, and during the time said 1000 bales of waste silk were in course of transportation on said S. S. "Canada Maru" under the said bills of lading, said vessel stranded and large quantities of salt water entered her holds, and as a result 500 bales of said waste silk known as "Canton Steam Waste Silk No. 1" and 367 bales of said waste silk known as "Canton Steam Waste Silk No. 2" became wet from the contact with the salt water. [26]

That upon arrival of said S. S. "Canada Maru"

at Tacoma, Washington, the said 1000 bales of waste silk were discharged from said vessel. Such discharge was begun early in the morning of August 12, 1918.

IX.

That the 133 bales of waste silk which had not been wet with salt water were in due course transported by defendant to destination.

That the remaining 867 bales which had been wet with salt water were discharged on the dock, which dock belonged to the Chicago, Milwaukee & St. Paul Railway Company, and was then being maintained and operated by defendant as a part of said railway system.

That after the vessel had commenced discharging the wet silk, Mr. Taylor, the representative of the underwriters and owners thereof, called on Mr. Cheeney, the chief clerk of the freight agent at Tacoma, and who was in charge of the dock and the movement of freight therefrom, and told Mr. Cheeney that he was very anxious to have quick dispatch of the wet silk, and that it was important that it should go forward in its wet condition. Cheeney and Taylor looked at the silk as it was being discharged from the vessel and placed on the dock, and Taylor requested that it be forwarded by silk train service in refrigerator-cars, and Cheeney agreed to so forward it, stating that the cost of such service would be $7.50 per hundred pounds as against the bill of lad*k*ing freight of $1.75 per hundred, and that there would be an additional charge for refrigeration of approximately

$21.00 per car to pay, all of which Taylor agreed to. On August 14th, Taylor again called on Cheeney to see how the matter was progressing, and [27] he and Cheeney again examined the silk, and Taylor was told by Cheeney that the cars had been ordered and would be brought in shortly, and thereafter the cars were brought in, and approximately one-half of the wet silk bales were loaded on two or more refrigerator-cars for shipment.

X.

That after thus contracting for and accepting all of said 867 bales of wet waste silk for transportation as aforesaid and after loading approximately one-half of said bales in refrigerator-cars as aforesaid, the defendant without the consent of plaintiff and in disregard of plaintiff's protest, failed and refused to transport said bales of wet waste silk, or any part thereof to destination, and thereafter defendant caused the bales loaded in said refrigerator-cars to be unloaded on said dock, all contrary to the terms and requirements of the aforesaid contract of carriage.

XI.

That at the time said 867 wet bales were accepted for shipment as aforesaid and at all times thereafter, the same were properly packed and in condition for safe transportation by defendant from Tacoma to destination by silk or passenger train service in refrigerator-cars, and such transportation was not prohibited by any regulation of the Interstate Commerce Commission.

XII.

That thereafter defendant demanded that said bales be dried and reconditioned before defendant would transport the same to destination, and plaintiff in order to secure transportation [28] of said bales to destination was required to and did cause the same to be dried.

That the reasonable cost and expense of drying said bales was $5000, which sum plaintiff paid therefor.

That plaintiff in taking possession of said 867 bales of wet waste silk for the purpose of drying it as aforesaid did so without relinquishing any of plaintiff's rights in the premises.

That after said 867 bales had been dried as aforesaid, the defendant transported the same without additional freight or charges to destination, to wit: Providence, Rhode Island, and there delivered the same to plaintiff.

XIII.

That the drying of said 867 bales of wet waste silk was done in a reasonable and proper manner.

That the natural and approximate result of the drying of said bales of waste silk was a weakening of the fiber and a discoloration of said waste silk.

That upon arrival of said 867 bales of waste silk at destination, the reasonable, fair market value thereof was the sum of $14,815.67, and no more.

XIV.

That had defendant carried out its contract with plaintiff and transported said 867 bales of wet waste silk to destination by silk or passenger train

service in refrigerator-cars, the fair market value of 500 bales of No. 1 waste silk upon delivery at destination would have been $95,394.25, less 10%, and the fair market value of the 367 [29] bales of No. 2 Waste silk upon delivery at destination would have been $40,342.27, less 10%, and the total net value of said 867 bales upon delivery at destination would have been $122,163.32.

XV.

That in addition to the bill of lading freight, the contract between the defendant and plaintiff relating to the transportation of said 867 bales of wet waste silk from Tacoma, Washington, to destination by silk or passenger train service in refrigerator-cars required the plaintiff to pay further freight and charges amounting to $6,724.75.

XVI.

That as a result of the failure and refusal of the defendant to perform its contract to transport said 867 bales of wet waste silk from Tacoma, Washington, to destination by silk or passenger train service in refrigerator-cars, the plaintiff has been damaged in the sum of $105,622.90.

XVII.

That all of said 1000 bales of waste silk were insured against damage in transit from Hong Kong to Providence, Rhode Island, by an open policy issued by the Atlantic Mutual Insurance Company, and on February 6, March 7, and March 12, 1919, the plaintiff received from the insurance company $102,052.96 in the aggregate "as a loan pending collection of loss on 868 bales of silk waste ex

steamer "Canada Maru" refund of the loan to be made to said Atlantic Mutual Insurance Company out of the proceeds of the collection specified." [30]

With respect to shipments such as involved in this action the insurance policy contained a clause as follows: "It is by the assured expressly stipulated in respect to land carriers that no assignment shall be made to such carriers of claim for loss or contribution of any kind under this policy, nor shall the right of subrogation be abrogated or impaired by or through any agreement intended to relieve such carriers from duties or obligations imposed or recognized by the common law or otherwise. [31]

As conclusions of law, the Court finds:

1. That plaintiff is the real party in interest and entitled to maintain this suit.

2. That the contract between Cheeney and Taylor for the movement of the goods from Tacoma by silk train in refrigerator-cars was valid and binding on the defendant and no good sufficient reason is shown for defendant's refusal to comply therewith.

3. That plaintiff is entitled to have and recover from defendant damages in the sum of $105,622.90 with costs and disbursements properly taxed in this action, and that a judgment in favor of the plaintiff and against the defendant shall be entered accordingly.

To each of the foregoing facts and conclusions of

law defendant excepts and such exceptions are hereby allowed.

R. S. BEAN,
Judge.

December 7, 1921.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Dec. 9, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [32]

In the United States District Court for the Western District of Washington, Southern Division.

AMERICAN SILK SPINNING COMPANY,
Plaintiff,

vs.

DIRECTOR GENERAL OF RAILROADS (Operating Chicago, Milwaukee & St. Paul Railway),
Defendant.

Findings of Fact and Conclusions of Law, With Exceptions Allowed.

This cause came on regularly for hearing in October, 1921, before the undersigned Judge of the United States District Court, sitting by special assignment, the plaintiff appearing by its attorneys, J. M. Richardson Lyeth, Esq., and Bruce C. Shorts of the firm of Ballinger, Battle, Hulbert & Shorts; and the defendant appearing by its attorneys, George W. Korte, Esq., and C. H. Hanford,

Esq., and thereupon by stipulation in writing signed by the parties, jury trial was waived.

And now at this time, the Court having duly considered the pleadings, evidence and arguments of counsel, finds the facts in the case to be as follows:

I.

That the plaintiff at all the times hereinafter mentioned was and still is a corporation organized and existing under the laws of the State of Rhode Island, with its principal place of business in the City of Providence in said state, and is a citizen of said state.

II.

That the defendant at all times herein mentioned was the United States Director General of Railroads [33] duly appointed and acting under and by virtue of an Act of Congress, and at all times herein mentioned was operating as a common carrier of freight and passengers the railroad lines of the Chicago, Milwaukee & St. Paul Railway Company between the Cities of Seattle and Tacoma, Washington, and the City of Chicago, Illinois. That the Chicago, Milwaukee & St. Paul Railway Company at the times herein mentioned was and still is a corporation organized and existing under the laws of the State of Wisconsin, and is a citizen of said state.

III.

That on June 21st and 24th, 1918, the plaintiff caused to be shipped, freight prepaid, from Canton, China, 1000 bales of waste silk, of which 700 bales were consigned to the order of Messrs. Heidelbach,

Ickelheimer & Co., of New York, and 300 bales to Goldman, Sachs & Co., New York, all destined to plaintiff, American Silk Spinning Company at Providence, Rhode Island. That 500 bales were of the quality known as "No. 1 Canton Steam Waste Silk" and 500 bales were of the quality known as "No. 2 Canton Steam Waste Silk."

Defendant's exception allowed.

IV.

That the said 1000 bales of waste silk were delivered at Canton, China, to Osaka Shosen Kaisha, Ltd., and upon delivery to and receipt of said bales in good order and conditions, said Osaka Shosen Kaisha, Ltd., on behalf of itself, separately and as a duly authorized agent of the defendant operating lines of railroad, as aforesaid, did jointly execute and deliver four certain through Trans-Pacific and Overland Bills of Lading [34] covering the transportation of said 1000 bales of waste silk from Canton, China, to Providence, Rhode Island, and consigned and destined as aforesaid.

V.

That by the terms of said bills of lading said waste silk was to be carried by said Osaka Shosen Kaisha, Ltd., from Canton, China, to Seattle, or Tacoma, Washington, on its steamship "Canada Maru" and there delivered to the defendant to be carried by defendant over the lines of the Chicago, Milwaukee & St. Paul Railway Company and other lines of railroad connecting therewith to the destination named in said bills of lading, to wit, Provi-

dence, Rhode Island, and there delivered to the order of said consignee.

VI.

That said goods were purchased by the plaintiff of the manufacturer in China on four months' letter of credit from date of shipment, issued by the consignee banks, and on August 7, 1918, and prior to the arrival of the goods at Tacoma, the consignee banks without receiving immediate payment of the purchase price, endorsed and delivered the bills of lading to the plaintiff, and plaintiff subsequently paid the drafts which had been guaranteed by letters of credit issued by the consignee banks, when the same became due.

VII.

That said bills of lading were numbered, dated and covered the said 1000 bales of waste silk as follows:

B/L No. 8 dated June 21, 1918, 300 bales.

B/L No. 9 dated June 21, 1918, 200 bales.

B/L No. 10 dated June 24, 1918, 200 bales.

B/L No. 11 dated June 24, 1918, 300 bales. [35]

That each of said bills of lading contained stipulations of the following tenor: "Any carrier or party liable on account of loss of or damages to any part of said property shall have the right of subrogation for the full benefit of any insurance that may have been effected upon or on account of said property."

"Except in the case of negligence in the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the

carrier or party in possession) the carrier or party in possession shall not be liable for loss, damage or delay occurring while the property described herein is stopped and held in transit upon request of the shipper, owner or party entitled to make such request; or resulting from a defect or vice in the property, or from riots or strikes."

That at the time the bills of lading were issued freight for the through transportation service was prepaid at the tariff rates as to the railroad service prescribed in the Tariff previously filed with the Interstate Commerce Commissioner and then in effect.

VIII.

That on July 30, 1918, and during the time said 1000 bales of waste silk were in course of transportation on said S. S. "Canada Maru" under the said bills of lading, said vessel stranded and large quantities of salt water entered her holds, and as a result 500 bales of said waste silk known as "Canton Steam Waste Silk No. 1" and 367 bales of said waste silk known as "Canton Steam Waste Silk No. 2" became wet from the contact with the salt water.

Defendant's exception allowed. [36]

That upon arrival of said S. S. "Canada Maru" at Tacoma, Washington, the said 1000 bales of waste silk were discharged from said vessel. Such discharge was begun early in the morning of August 12, 1918.

IX.

That the 133 bales of waste silk which had not

been wet with salt water were in due course transported by defendant to destination.

That the remaining 867 bales which had been wet with salt water were discharged on the dock, which dock belonged to the Chicago, Milwaukee & St. Paul Railway Company, and was then being maintained and operated by defendant as a part of said railway system.

That after the vessel had commenced discharging the wet silk, Mr. Taylor, the representative of the underwriters and owners thereof, called on Mr. Cheeney, the chief clerk of the freight agent at Tacoma, and who was in charge of the dock and the movement of freight therefrom, and told Mr. Cheeney that he was very anxious to have quick dispatch of the wet silk, and that it was important that it should go forward in its wet condition. Cheeney and Taylor looked at the silk as it was being discharged from the vessel and placed on the dock, and Taylor requested that it be forwarded by silk train service in refrigerator-cars, and Cheeney agreed to so forward it, stating that the cost of such service would be $7.50 per hundred pounds as against the bill of lading freight of $1.75 per hundred, and that there would be an additional charge for refrigeration of approximately $21.00 per car to pay, all of which Taylor agreed to. On August 14th, Taylor again called on Cheeney to see how the matter was progressing, and [37] he and Cheeney again examined the silk, and Taylor was told by Cheeney that the cars had been ordered and would be brought in shortly, and thereafter the

cars were brought in, and approximately one-half of the wet silk bales were loaded on two or more refrigerator-cars for shipment.

Defendant's exception allowed.

X.

That after thus contracting for and accepting all of said 867 bales of wet waste silk for transportation as aforesaid and after loading approximately one-half of said bales in refrigerator-cars as aforesaid, the defendant without the consent of plaintiff and in disregard of plaintiff's protest, failed and refused to transport said bales of wet waste silk, or any part thereof to destination, and thereafter defendant caused the bales loaded in said refrigerator-cars to be unloaded on said dock, all contrary to the terms and requirements of the aforesaid contract of carriage.

Defendant's exception allowed.

XI.

That at the time said 867 wet bales were accepted for shipment as aforesaid and at all times thereafter, the same were properly packed and in condition for safe transportation by defendant from Tacoma to destination by silk or passenger train service in refrigerator-cars, and such transportation was not prohibited by any regulation of the Interstate Commerce Commission.

Defendant's exception allowed.

XII.

That thereafter defendant demanded that said bales be dried and reconditioned before defendant would transport the same to destination, and plain-

tiff in order to secure transportation [38] of said bales to destination was required to and did cause the same to be dried.

That the reasonable cost and expense of drying said bales was $5,000, which sum plaintiff paid therefor.

Defendant's exception allowed.

That plaintiff in taking possession of said 867 bales of wet waste silk for the purpose of drying it as aforesaid did so without relinquishing any of plaintiff's rights in the premises.

Defendant's exception allowed.

That after said 867 bales had been dried as aforesaid, the defendant transported the same without additional freight or charges to destination, to wit: Providence, Rhode Island, and there delivered the same to plaintiff.

XIII.

That the drying of said 867 bales of wet waste silk was done in a reasonable and proper manner.

That the natural and proximate result of the drying of said bales of wet waste silk was a weakening of the fiber and a discoloration of said waste silk.

Defendant's exception allowed.

That upon arrival of said 867 bales of waste silk at destination, the reasonable, fair market value thereof was the sum of $14,815.67, and no more.

Defendant's exception allowed.

XIV.

That had defendant carried out its contract with plaintiff and transported said 867 bales of wet

waste silk to destination by silk or passenger train service in refrigerator-cars, the fair market value of 500 bales of No. 1 waste silk upon delivery at destination would have been $95,394.25, less 10%, and the fair market value of 367 [39] bales of No. 2 waste silk upon delivery at destination would have been $40,342.27, less 10%, and the total net value of said 867 bales upon delivery at destination would have been $122,163.32.

Defendant's exception allowed.

XV.

That in addition to the bill of lading freight, the contract between the defendant and plaintiff relating to the transportation of said 867 bales of wet waste silk from Tacoma, Washington, to destination by silk or passenger train service in refrigerator-cars required the plaintiff to pay further freight and charges amounting to $6,724.75.

Defendant's exception allowed.

XVI.

That as a result of the failure and refusal of the defendant to perform its contract to transport said 867 bales of wet waste silk from Tacoma, Washington, to destination by silk or passenger train service in refrigerator-cars, the plaintiff has been damaged in the sum of $105,622.90.

Defendant's exception allowed.

XVII.

That all of said 1000 bales of waste silk were insured against damage in transit from Hong Kong to Providence, Rhode Island, by an open policy issued by the Atlantic Mutual Insurance Company,

and on February 6, March 7, and March 12, 1919, the plaintiff received from the insurance company $102,052.96 in the aggregate "as a loan pending collection of loss on 868 bales of silk waste ex steamer 'Canada Maru,' refund of the loan to be made to said Atlantic Mutual Insurance Company out of the proceeds of the collection specified."

Defendant's exception allowed. [40]

With respect to shipments such as involved in this action the insurance policy contained a clause as follows: "It is by the assured expressly stipulated in respect to land carriers that no assignment shall be made to such carriers of claim for loss or contribution of any kind under this policy, nor shall the right of subrogation be abrogated or impaired by or through any agreement intended to relieve such carriers from duties or obligations imposed or recognized by the common law or otherwise. [41]

As conclusion of law the Court finds:

1. That plaintiff is the real party in interest and entitled to maintain this suit.

Defendant's exception allowed.

2. That the contract between Cheeney and Taylor for the movement of the goods from Tacoma by silk train in refrigerator-cars was valid and binding on the defendant and no good sufficient reason is shown for defendant's refusal to comply therewith.

Defendant's exception allowed.

3. That plaintiff is entitled to have and recover from defendant damages in the sum of $105,622.90 with costs and disbursements properly taxed in this

action, and that a judgment in favor of the plaintiff and against the defendant shall be entered accordingly.

Defendant's exception allowed.

To each of the foregoing facts and conclusions of law defendant excepts as above specified and such exceptions are hereby allowed, and for the purpose of making a record of said exceptions this copy may be filed.

R. S. BEAN,
Judge.

December 7, 1921.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Dec. 14, 1921. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [42]

District Court of the United States, Western District of Washington, Southern Division.

No. 2905.

AMERICAN SILK SPINNING COMPANY,
Plaintiff,

vs.

DIRECTOR GENERAL OF RAILROADS (Operating Chicago, Milwaukee & St. Paul Railway),
Defendant.

Defendant's Proposed Findings of Fact and Conclusions of Law — Refusal by the Court and Exceptions Allowed.

By stipulation in writing, signed by the parties and filed, the trial of this cause by jury was waived, and the trial came on at Seattle without being transferred from Tacoma where the record exists.

The trial proceeded before Honorable R. S. Bean, United States District Judge, presiding, and thereupon the parties respectively introduced their evidence and submitted the cause on their arguments.

On due consideration of the pleadings, evidence and arguments, the Court finds the facts of the case to be as follows:

FINDINGS OF FACT.

1. The paragraphs numbered "first" and "second" of the plaintiff's complaint are not controverted and the allegations thereof are true.

2. On the 21st and 24th days of June, 1918, four bills of lading were issued at Canton, China, for the transportation of one thousand (1,000) bales of silk waste from Hong Kong, China, to Tacoma, Washington, by the steamship "Canada Maru," and from Tacoma, Washington, to Providence, Rhode Island, on the Chicago, Milwaukee [43] & St. Paul Railway and connecting lines, and said 1,000 bales were received in apparent good order on board of the "Canada Maru."

3. On the 30th day of July, 1918, the "Canada Maru," with said 1,000 bales on board, met with a

maritime disaster by striking on rocks and stranding on the coast of Washington near Cape Flattery, and said vessel was thereby so badly damaged that her hold and cargo space were filled with sea water and eight hundred and sixty-seven (867) of said bales were completely submerged in the hold of said vessel.

Refused—Defendant excepts.

4. Said vessel was rescued from her perilous position and towed to Tacoma, where she arrived on the 10th day of August, 1918, and from thence proceeded to a drydock for necessary temporary repairs before commencing to discharge cargo. After returning to Tacoma she commenced discharging said bales of silk on the 12th day of August and completed discharging said bales on the 16th day of August, 1918.

Refused—Defendant excepts.

5. When discharged from said vessel, one hundred thirty-three (133) of said bales were found to be undamaged and the same were promptly transported to destination. The other 867 bales were completely saturated with sea water, whereby heat and malodorous fumes emanated therefrom to such an extent that the stevedores were able only with great difficulty to remove the same from the hold of said vessel, and, after being unloaded on the dock, heating and diffusion of malodorous fumes continued, to such an extent that, after inspection by a cargo surveyor, said 867 bales were, by agents of the Chicago, Milwaukee & St. Paul Railway Company and said cargo surveyor, deemed to be

dangerous to handle, dangerous to carry by railway from Tacoma to Providence, and unfit for transportation [44] without being reconditioned.

Refused—Defendant excepts.

6. All of said 1000 bales were insured against damage in transit from Hong Kong to Providence by the Atlantic Mutual Insurance Company; and during the time of the unloading of the said bales from said vessel, Frank G. Taylor, representing the Underwriters, by direction of the Atlantic Mutual Insurance Company, visited the premises where said wet bales were, for the time being, situated, and became informed as to the condition thereof, and, after being definitely informed by agents of the Chicago, Milwaukee & St. Paul Railway Company that the same were deemed to be unfit for transportation and that said Railway Company would not assume the risk of transporting the same from Tacoma in their wet condition, caused said wet bales to be removed from Tacoma, to Seattle for the purpose of being reconditioned by drying the same, and entered into a contract with the Pacific Oil Mills, at Seattle, to perform the service of drying and rebaling the contents of said bales after being dried and redelivering the same, which contract was performed by said Pacific Oil Mills, and for said service said Taylor paid Five Thousand ($5,000) Dollars.

Refused—Defendant excepts.

7. That the time consumed in completing said

operation of drying extended until the 20th day of January, 1919.

Refused—Defendant excepts.

8. That, atfer being conditioned as aforesaid, all of the contents of said 867 bales were, by the Chicago, Milwaukee & St. Paul Railway and connecting lines, transported from Seattle to, and delivered at Providence, Rhode Island, that service being completed on the 30th day of January, 1919.

Refused—Defendant excepts. [45]

9. At the times referred to in these findings, the steamship "Canada Maru" was being operated by a foreign corporation, namely Osaka Shosen Kiasha, Ltd., and the four bills of lading aforesaid were issued by said foreign corporation in its own behalf and as agent for the Chicago, Milwaukee & St. Paul Railway Company, then being operated by the Director General of Railroads, and freight for the through transportation service was prepaid at the tariff rates, as to the railway service, prescribed in tariffs previously filed with the Interstate Commerce Commission and then in effect.

By three of said bills of lading, covering 700 of said 1000 bales, the same were consigned to the order of Heidelbach, Ickelheimer Co., New York, and, by the other of said bills of lading, covering 300 of said bales, the same were consigned to the order of Goldman Sachs & Co., of New York, and all of said bills of lading, after being endorsed by said consignees, were received by the plaintiff herein on the 7th day of August, 1918.

10. On the security of letters of credit all of

said 1,000 bales were sold by the manufacturers in China on a credit of four (4) months from the date of shipment thereof from China; the consignees aforesaid, without receiving immediate payment of the purchase price of said merchandise, at the time of delivering said bills of lading to the plaintiff, took from said plaintiff a trust receipt, in effect stipulating that said merchandise belonged to said consignees until the purchase price aforesaid should be paid, which payment was made at the time of, and not before, the expiration of said four months period of credit, which was on or about October 24th, 1918, and at that time, by said payment, the plaintiff acquired ownership of said merchandise.

Refused—Defendant excepts. [46]

11. In whatever way said merchandise became damaged or diminished in value, subsequent to the unloading thereof from the "Canada Maru" such damage or impairment of value occurred and was fully consummated during the time intervening between the 12th day of August and the 24th day of October, 1918, during which time the consignees, Heidlebach, Ickelheimer & Co. and Goldman, Sachs & Co., named respectively in said bill of lading, were owners of said merchandise.

Refused—Defendant excepts.

12. The market value of the silk waste contained in said 867 bales, on arrival at Providence in the due and ordinary course of transportation, if then undamaged, would have been $125,653.78; that gross sum being arrived at by computation of the market value of two grades of silk waste, No. 1 grade being

at the rate of $1.51 per pound, of which there was 46,613 pounds, and No. 2 grade at .87 per pound, and there is a total failure on the part of plaintiff to introduce any evidence respecting the weight of the silk of said No. 2 grade; and there is a total failure on the part of plaintiff to prove the difference in market value between the sound value—viz: $125,653.78—and the market value of said merchandise at the time of its delivery at Providence in the state it was after being reconditioned as aforesaid.

Refused—Defendant excepts.

13. That in the months of February and March, 1919, the Atlantic Mutual Insurance Company paid the plaintiff sums of money aggregating Seventy-seven Thousand Seven Hundred Fifty-two and 96/100 dollars, and there is a total failure on the part of plaintiff to prove that any damage by deterioration of said merchandise, or expenses chargeable as a loss incidental to the transportation [47] thereof, amounts to any sum in excess of said $77,752.96 paid by said Insurance Company as aforesaid, whereby the plaintiff previous to the commencement of this action, received full compensation for whatever loss or damage it may have sustained in connection with the transportation of said merchandise.

Refused—Defendant excepts.

14. That each of the said four bills of lading contains a stipulation of the following tenor:

"Any carrier or party liable on account of loss or damage to any of said property, shall,

by right of subrogation, have the full benefit of any insurance that may have been effected upon or on account of said property."

15. That each of said four bills of lading contains a stipulation of the following tenor:

"2. Except in the case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in posesssion shall not be liable for loss, damage or delay occurring while the property described herein is stopped and held in transit upon request of the shipper, owner or party entitled to make such request, or resulting from a defect or vice in the property, or from the riots, or strikes."

16. The defendant did not make, or enter into, any agreement for transportation of said 867 bales while in the wet condition in which they were when discharged from the "Canada Maru" or any agreement whatsoever respecting the transportation of said merchandise other than, or different from, the written contract contained in said four bills of lading, nor at any time accept said 867 bales, or any part thereof, for transportation without being reconditioned.

Refused—Defendant excepts.

17. The defendant did not, by any act or omission, cause, or contribute to the cause, of any damage whatever or impairment of [48] value of said merchandise, or any part thereof, or in any manner fail to fully and completely perform his

contract for that part of the transportation by his railroad.

Refused—Defendant excepts.

The foregoing findings of fact requested by the defendant were refused and the exceptions noted were allowed by the Court.

R. S. BEAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Dec. 14, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [49]

In the United States District Court for the Western District of Washington, Southern Division.

No. 2905.

AMERICAN SILK SPINNING COMPANY,
Plaintiff,

vs.

DIRECTOR GENERAL OF RAILROADS (Operating Chicago, Milwaukee & St. Paul Railway),
Defendant.

Defendant's Bill of Exceptions to the Court's Findings of Fact and Conclusions of Law.

The defendant, claiming error in the Court's decision contained in the findings of facts and conclusions of law filed herein, takes exception thereto, as follows:

I.

Referring to the finding in paragraph numbered III the defendaont excepts to that portion thereof in the following words:

> "That 500 bales were of the quality known as 'No. 1 Canton Steam Waste Silk' and 500 bales were of the quality known as 'No. 2 Canton Steam Waste Silk' ";

For the reason that there is no evidence indicating how many of the bales of Canton Waste Silk were of the quality known as No. 1, or the number of bales of the quality indicated as No. 2.

II.

Referring to the finding of fact contained in paragraph thereof numbered VIII the defendant excepts to that part thereof in the following words:

> "That on July 30, 1918, and during the time said 1000 bales of waste silk were in course of transportation on said S. S. 'Canada Maru' under the said bills of lading, said vessel stranded and large quantities of salt water entered her holds, and as a result 500 bales of waste silk known as 'Canton Steam waste Silk No. 1' and 367 bales of said waste silk known as 'Canton Steam Waste Silk No. 2' became wet from the contact with the salt water."

For the reason that there is no evidence upon which the Court could find that 500 of the bales that were wet with salt water were of the quality known as Canton Steam Waste Silk No. 1, nor [50] from which the Court could find that 367 of the wet

bales were of the quality known as Canton Steam Waste Silk No. 2.

III.

Referring to the finding of fact contained in the paragraph thereof numbered IX the defendant excepts to that portion thereof in the following words:

> "That after the vessel had commenced discharging the wet silk, Mr. Taylor, the representative of the underwriters and owners thereof, called on Mr. Cheeney, the Chief Clerk of the Freight Agent at Tacoma, and who was in charge of the dock and the movement of freight therefrom, and told Mr. Cheeney that he was very anxious to have quick dispatch of the wet silk, and that it was important that it should go forward in its wet condition. Cheeney and Taylor looked at the silk as it was being discharged from the vessel and placed on the dock, and Taylor requested that it be forwarded by silk train service in refrigerator-cars, and Cheeney agreed to so forward it, stating that the cost of such service would be $7.50 per hundred pounds as against the bill of lading freight of $1.75 per hundred, and that there would be an additional charge for refrigeration of approximately $21.00 per car to pay, all of which Taylor agreed to.
>
> "On August 14th, Taylor again called on Cheeney to see how the matter was progressing, and he and Cheeney again examined the silk, and Taylor was told by Cheeney that the cars

had been ordered and would be brought in shortly, and thereafter the cars were brought in, and approximately one-half of the wet silk bales were loaded on two or more refrigerator-cars for shipment."

For the reason that there is no evidence upon which the Court could find that Cheeney was in charge of the dock or the movement of freight therefrom, or that Cheeney had any authority to make or enter into any agreement respecting the transportation of freight, and for the further reason that the contradicted evidence in the case and an the evidence bearing on that point proves affirmatively that Cheeney did not have any authority whatever to make or enter into any agreement respecting the transportation of freight; and for the further reason that by the Interstate Commerce law railway carriers are strictly prohibited [51] from entering into special contracts for special service at special rates for transportation of freight; and for the further reason that Taylor did not in fact pay, or tender to pay, or make any promise binding upon the plaintiff to pay extra charges for the service required for transportation of 867 bales by a silk train, or the extra charge for transportation of said bales in refrigerator-cars; and for the further reason that said finding does not include the requirement demanded by Taylor for sprinkling or drenching said wet bales so as to keep them continuously wet during the time of transit to destination.

IV.

Defendant excepts to all of said findings included in paragraph thereof numbered X, for the reason that there is no evidence on which the Court could find that there was any contract for transportation of 867 bales in their wet condition, nor on which the Court could find that the unloading of the refrigerator-cars was contrary to the terms and requirements of any contract.

V.

Defendant excepts to all of said findings contained in paragraph thereof numbered XI, for the reason that there is no evidence on which the Court could find that said wet bales were in a condition fit for safe transportation, and for the further reason that the evidence proves affirmatively that the wetting of said 867 bales generated heat and caused diffusion of offensive fumes so that the same were difficult to handle, liable to cause spontaneous combustion and fire while confined in freight cars, and were totally unfit for transportation without being reconditioned; and for the further reason that the Court's finding that transportation [52] of said bales while in a wet condition was not prohibited by any regulation of the Interstate Commerce Commission is immaterial.

VI.

Defendant excepts to that part of the findings contained in paragraph thereof numbered XII in the following words:

"That the reasonable cost and expense of drying said bales was $5,000, which sum plaintiff paid therefor."

For the reason that there is no evidence on which the Court could find that the plaintiff paid the cost of drying and reconditioning said 867 bales; but, on the contrary, the uncontradicted evidence proves that the $5,000 was paid by Taylor, the underwriter's agent, in that behalf.

VII.

Defendant excepts to that part of the findings contained in paragraph thereof numbered XII, in the following words:

"That plaintiff in taking possession of said 867 bales of wet waste silk for the purpose of drying it as aforesaid did so without relinquishing any of plaintiff's rights in the premises."

For the reason that there is no evidence upon which the Court could find that the plaintiff or Taylor made any reservation of rights in connection with the drying and reconditioning of said 867 bales under Taylor's direction.

VIII.

Defendant excepts to that part of the findings contained in paragraph thereof numbered XIII, in the following words:

"That the natural and proximate result of the drying of said bales of waste silk was a weakening of the fiber and a discoloration of said waste silk."

For the reason that there is no evidence on which the Court could find that the drying of said bales weakened the fiber or caused a discoloration of said waste silk, but, on the contrary, the plaintiff's [53] complaint alleges the effect of the drying to have been a damage only by discoloration, and the uncontradicted evidence proves that the weakening of the fiber of the silk and discoloration thereof was caused by the wetting of said bales and not by the drying.

IX.

Defendant excepts to that part of the findings contained in paragraph thereof numbered XIII, in the following words:

> "That upon arrival of said 867 bales of waste silk at destination, the reasonable, fair market value thereof was the sum of $14,815.67, and no more."

For the reason that there is no evidence on which the Court could find that the reasonable, fair market value of said 867 bales at the time of delivery thereof at destination was not in excess of the sum of $14,815.67.

X.

Defendant excepts to all of said findings contained in paragraph thereof numbered XIV, for the reason and on the ground that there is no evidence on which the Court could find that of said 867 bales 500 bales were of the quality of grade known as No. 1, or find that the market value of the bales of No. 1 was $95,394.25, less 10%; or that

the market value of the No. 2 was $40,342.27, less 10%; or that the total net value of said 867 bales was $122,163.32. On the contrary, the only evidence as to quantities and value of 867 bales of the respective grades No. 1 and No. 2, is contained in the deposition of plaintiff's witness Edward W. Lownes in which he stated the quantity of the No. 1 grade to have been 46,613 pounds and that the total net value of said 867 bales was $113,088.40. [54]

XI.

Defendant excepts to all of the findings contained in paragraph thereof numbered XV, for the reason that there is no evidence on which the Court could find that the amount payable by the plaintiff for the extra services required in transportation of said 867 bales to destination in their wet condition amounted to $6724.75, and for the reason and on the ground that there was no contract fixing the amount payable for such extra service and the uncontradicted evidence proves that the tariffs on file with the Interstate Commerce Commission and the bill of lading contracts under which the transportation service was undertaken are alike silent as to any rate payable for such or similar extra service, and the amount of extra charges could not be provided for by special agreement.

XII.

Defendant excepts to all of the findings contained in paragraph thereof numbered XVI for the reason that there is no evidence on which the Court could find the amount of plaintiff's damages to be $105,-

622.90, or any sum whatever, nor on which the Court could find any damages whatever caused by any act, omission or failure on the part of the defendant to fully perform the contract undertaken and covered by the bills of lading.

XIII.

Defendant excepts to so much of the findings contained in paragraph numbered XVII as amount to a decision that all or any of the money paid to the plaintiff by the Atlantic Mutual Insurance Company was a loan, for the reason that the payments were in discharge of the Insurance Company's obligation as an insurer and without any obligation on the part of the plaintiff to ever repay any [55] part of the money so received.

XIV.

Defendant excepts to paragraph numbered I of the Court's conclusions of law, for the reason that by the uncontradicted evidence it is proved that the plaintiff is not the real party in interest, but commenced and maintained this action for the sole benefit of the Atlantic Mutual Insurance Company; and by the uncontradicted evidence it is proved that the plaintiff was not the owner of the 867 bales at the time the same were damaged.

XV.

Defendant excepts to paragraph numbered 2 of the Court's conclusions of law, for the reason that there was no contract between Cheeney and Taylor for the movement of the 867 bales; for the further reason that Cheeney was not an authorized agent to make any contract binding on the defendant

with respect to the transportation of freight; and for the further reason that such a contract, if it had been formally made, would be unenforceable because expressly forbidden by the provisions of the Interstate Commerce Law.

XVI.

Defendant excepts to the third paragraph of the Court's conclusions of law for the reason that the same is contrary to the facts of the case and contrary to law.

XVII.

The defendant requested the Court to find and include in its findings of fact the following:

> "On the 30th day of July, 1918, the 'Canada Maru,' with said 1000 bales on board, met with a maritime disaster by striking on rocks and stranding on the coast of Washington near Cape Flattery, and said vessel was thereby so badly damaged that her hold and cargo space were filled with sea water and eight hundred and sixty-seven (867) of said bales were completely submerged in the hold of said vessel." [56]

And to the refusal of the Court to make and certify said finding the defendant excepts.

XVIII.

The defendant requested the Court to find and include in its findings of fact the following:

> "Said vessel was rescued from her perilous position and towed to Tacoma, where she arrived on the 10th day of August, 1918, and from thence proceeded to a drydock for nec-

essary temporary repairs before commencing to discharge cargo. After returning to Tacoma she commenced discharging said bales of silk on the 12th day of August, and completed discharging said bales on the 16th day of August, 1918."

And to the refusal of the Court to make and certify said finding the defendant excepts.

XIX.

The defendant requested the Court to find and include in its findings of fact the following:

"When discharged from said vessel, one hundred thirty-three (133) of said bales were found to be undamaged and the same were promptly transported to destination. The other 867 bales were completely saturated with sea water, whereby heat and malodorous fumes emanated therefrom to such an extent that the stevedores were able only with great difficulty to remove the same from the hold of said vessel, and, after being unloaded on the dock, heating and diffusion of malodorous fumes continued, to such an extent that, after inspection by a Cargo Surveyor, said 867 bales were, by agents of the Chicago, Milwaukee & St. Paul Railway Company and said Cargo Surveyor, deemed to be dangerous to handle, dangerous to carry by railway from Tacoma to Providence, and unfit for transportation without being reconditioned.'

And to the refusal of the Court to make and certify such finding the defendant excepts.

XX.

The defendant requested the Court to find and include in its findings of facts the following: [57]

"All of said 1000 bales were insured against damage in transit from Hong Kong to Providence by the Atlantic Mutual Insurance Company; and during the time of the unloading of said bales from said vessel, Frank G. Taylor, representing the Underwriters, by direction of the Atlantic Mutual Insurance Company, visited the premises where said wet bales were, for the time being, situated, and became informed as to the condition thereof, and, after being definitely informed by agents of the Chicago, Milwaukee & St. Paul Railway Company that the same were deemed to be unfit for transportation and that said Railway Company would not assume the risk of transporting the same from Tacoma in their wet condition, caused said wet bales to be removed from Tacoma to Seattle for the purpose of being reconditioned by drying the same, and entered into a contract with the Pacific Oil Mills, at Seattle, to perform the service of drying and re-baling the contents of said bales after being dried and re-delivering the same, which contract was performed by said Pacific Oil Mills, and for said service said Taylor paid Five Thousand ($5,000) Dollars."

And to the refusal of the Court to make and certify such finding the defendant excepts.

XXI.

The defendant requested the Court to find and

include in its findings of facts the following:

"That the time consumed in completing said operation of drying extended until the 20th day of January, 1919."

And to the refusal of the Court to make and certify said finding the defendant excepts.

XXII.

The defendant requested the Court to find and include in its findings of facts the following:

"That, after being reconditioned as aforesaid, all of the contents of said 867 bales were, by the Chicago, Milwaukee & St. Paul Railway and connecting lines, transported from Seattle to, and delivered at, Providence, Rhode Island, that service being completed on the 30th day of January, 1919."

And to the refusal of the Court to make and certify said finding the defendant excepts. [58]

XXIII.

The defendant requested the Court to find and include in its findings of facts the following:

"On the security of letters of credit all of said 1000 bales were sold by the manufacturers in China on a credit of four (4) months from the date of shipment thereof from China; the consignees aforesaid, without receiving immediate payment of the purchase price for said merchandise, at the time of delivering said bills of lading to the plaintiff, took from said plaintiff a trust receipt, in effect stipulating that said merchandise belonged to said consignees until their purchase price aforesaid should be

paid, which payment was made at the time of, and not before, the expiration of said four months period of credit, which was on or about October 24th, 1918, and at that time, by said payment, the plaintiff acquired ownership of said merchandise."

And to the refusal of the Court to make and certify said finding the defendant excepts.

XXIV.

The defendant requested the Court to find and include in its finding of facts the following:

"In whatever way said merchandise became damaged or diminished in value, subsequent to the unloading thereof from the 'Canada Maru,' such damage or impairment of value occurred and was fully consummated during the time intervening between the 12th day of August, and the 24th day of October, 1918, during which time the consignees, Heidelbach, Ickelheimer & Co. and Goldman, Sachs & Co., named respectively in said bills of lading, were owners of said merchandise."

And to the refusal of the Court to make and certify said finding the defendant excepts.

XXV.

The defendant requested the Court to find and include in its findings of facts the following:

"The market value of the silk waste contained in said 867 bales, on arrival at Providence in the due and ordinary course of transportation, if then undamaged, would have been $125,653.78; that gross sum being arrived at by

computation of the market value of two grades of silk waste, No. 1 grade being at the rate of $1.51 per pound, of which there was 46,613 pounds, and No. 2 grade at .87 per pound, and there is a total failure on the part of plaintiff to introduce any [59] evidence respecting the weight of the silk of said No. 2 grade; and there is a total failure on the part of plaintiff to prove the difference in market value between the sound value—viz: $125,653.78—and the market value of said merchandise at the time of its delivery at Providence in the state it was after being reconditioned as aforesaid."

And to the refusal of the Court to make and certify said finding the defendant exceptS.

XXVI.

The defendant requested the Court to find and include in its findings of facts the following:

"That in the months of February and March, 1919, the Atlantic Mutual Insurance Company paid the plaintiff sums of money aggregating Seventy-seven Thousand Seven Hundred Fifty-two and 96/100 Dollars, and there is a total failure on the part of plaintiff to prove that any damage by deterioration of said merchandise, or expenses chargeable as a loss incidental to the transportation thereof, amounts to any sum in excess of said $77,752.96, paid by said Insurance Company as aforesaid, whereby the plaintiff, previous to the commencement of this action, received full compensation for whatever loss or damage it may have sustained in con-

nection with the transportation of said merchandise."

And to the refusal of the Court to make and certify said finding the defendant excepts.

XXVII.

The defendant requested the Court to find and include in its findings of facts the following:

"The defendant did not make, or enter into, any agreement for transportation of said 867 bales while in the wet condition in which they were discharged from the 'Canada Maru' or any agreement whatsoever respecting the transportation of said merchandise other than, or different from, the written contract contained in said four bills of lading, nor at any time accept said 867 bales, or any part thereof, for transportation without being reconditioned."

And to the Court's refusal to make and certify said finding the defendant excepts. [60]

XXVIII.

The defendant requested the Court to find and include in its findings of facts the following:

"The defendant did not, by any act or omission, cause, or contribute to the cause, of any damage whatever or impairment of value of said merchandise, or any part thereof, or in any manner fail to fully and completely perform his contract for that part of the transportation by his Railroad."

And to the refusal of the Court to make and certify said finding the defendant excepts.

XXI.

The defendant requested the Court to state as a conclusion of law as follows:

> "The plaintiff herein is not the real party in interest nor entitled by law to maintain this action."

And to the refusal of the Court to make and certify such conclusion to the defendant excepts.

XXX.

The defendant requested the Court to state as a conclusion of law as follows:

> "The defendant is not, by any act or omission, guilty of any breach whatever of the contract sued on herein."

And to the refusal of the Court to make and certify such conclusion the defendant excepts.

XXXI.

The defendant requested the Court to state as a conclusion of law as follows:

> "The defendant is entitled to have a judgment in his favor that the plaintiff take nothing by its action herein."

And to the refusal of the Court to make and certify such conclusion the defendant excepts. [61]

XXXII.

The defendant requested the Court to state as a conclusion of law as follows:

> "The judgment to be entered herein must be in favor of the defendant for the amount of his taxable costs and disbursements."

And to the refusal of the Court to make and certify such conclusion the defendant excepts.

GEO. W. KORTE,
C. H. HANFORD,
Attorneys for Defendant.

BE IT REMEMBERED, That on this 13th day of December, 1921, the defendant presented and submitted the foregoing Bill of Exceptions, and the same and each of the exceptions therein noted is by the Court allowed.

R. S. BEAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Dec. 14, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [62]

District Court of the United States, Western District of Washington, Southern Division.

No. 2905.

AMERICAN SILK SPINNING COMPANY,
Plaintiff,

vs.

DIRECTOR GENERAL OF RAILROADS (Operating Chicago, Milwaukee & St. Paul Railway),
Defendant.

Motion and Order Extending Time Sixty Days to File Bill of Exceptions (Dated December 13, 1921).

The defendant herein moves the Court for an order extending, for a period of sixty (60) days, the time for preparing and submitting his general bill of exceptions for use in the prosecution of a writ of error from the Circuit Court of Appeals for the Ninth Circuit, for the reason that the record is voluminous and it will not be practicable to complete a general bill of *excepts* in less time.

GEO. W. KORTE,
C. H. HANFORD,
Attorneys for Defendant.
608 White Building,
Seattle, Washington.

ORDER.

On reading and filing the above motion, it is by the Court,

ORDERED: That the time for preparing and submitting the defendant's general bill of exceptions, for use in prosecuting a writ of error from the Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, extended for a period of sixty (60) days from this 13th day of December, 1921.

R. S. BEAN,
Judge. [63]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern

Division. Dec. 14, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [64]

In the United States District Court for the Western District of Washington, Southern Division.

No. 2905.

AMERICAN SILK SPINNING COMPANY,
Plaintiff,

vs.

DIRECTOR GENERAL OF RAILROADS (Operating Chicago, Milwaukee & St. Paul Railway),
Defendant.

Judgment.

This cause having come on regularly for hearing in October, 1921, before the undersigned Judge of the United States District Court, sitting by special assignment, the plaintiff and defendant appearing by their respective attorneys of record, and having filed in this cause a stipulation in writing, signed by the respective parties, waiving a jury trial of the case; witnesses having been duly sworn and examined in open court by the respective parties, and other evidence having been introduced, and arguments having been made by the counsel of both parties, and the court having duly considered the pleadings and all the evidence and the arguments of counsel, and having heretofore made and filed in this cause its Findings of Facts and Conclusions

of Law, and all acts, conditions and things required to be done precedent to the entry of judgment in this cause having been properly done, happened and been performed in regular and due form, as required by law, and the Court being fully advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff do have and recover from the [65] defendant damages in the sum of $105,622.90, with costs and disbursements properly taxed in this action, in the sum of $435.45, together with interest on said sums at the legal rate from date hereof until paid.

Dated December 15th, 1921.

R. S. BEAN,
Judge.

O. K. as to form.

GEO. W. KORTE,
C. H. HANFORD,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Dec. 16, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [66]

District Court of the United States, Western District of Washington, Southern Division.

No. 2905.

AMERICAN SILK SPINNING COMPANY,
Plaintiff,

vs.

DIRECTOR GENERAL OF RAILROADS (Operating Chicago, Milwaukee & St. Paul Railway),
Defendant.

Stipulation Extending Time Sixty Days to File General Bill of Exceptions (Dated December 14, 1921).

IT IS STIPULATED by and between the attorneys for the respective parties, that the defendant shall have, and is hereby granted, a period of sixty (60) days from and after the entry of judgment herein, within which to prepare, serve and file his general bill of exceptions for use in prosecuting a writ of error to the Circuit Court of Appeals for the Ninth Circuit.

Dated this 14th day of December, 1921.

BALLINGER, BATTLE, HULBERT & SHORTS,
J. M. RICHARDSON LYETH,
Attorneys for Plaintiff.
GEO. W. KORTE,
C. H. HANFORD,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Dec. 17, 1921. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [67]

United States District Court, Western District of Washington, Southern Division.

No. 2905.

AMERICAN SILK SPINNING COMPANY,
Plaintiff,

vs.

DIRECTOR GENERAL OF RAILROADS (Operating Chicago, Milwaukee & St. Paul Railway),
Defendant.

Stipulation as to Settlement of Bill of Exceptions.

Plaintiff's attorneys, having examined defendant's proposed general bill of exceptions, and various corrections having been made, allowed and incorporated in said general bill of exceptions, and there being no further amendments or corrections to be proposed by the plaintiff, it is

STIPULATED, between the attorneys of record for the plaintiff and for the defendant, that the Judge sitting in the trial of this case may settle and certify said proposed bill of exceptions of the defendant without further notice or other compliance with the statutes and the rules of this court

relating to the settlement and certification of a true bill of exceptions.

Dated this 8th day of February, 1922.

BALLINGER, BATTLE, HULBERT & SHORTS,

J. M. RICHARDSON LYETH,

Attorneys for Plaintiff.

GEO. W. KORTE,

C. H. HANFORD,

Attorneys for Defendant. [68]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Feb. 8, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [69]

United States District Court, Western District of Washington, Southern Division.

No. 2905.

AMERICAN SILK SPINNING COMPANY, a Corporation,

Plaintiff,

vs.

THE DIRECTOR GENERAL OF RAILROADS, (Operating the Chicago, Milwaukee & St. Paul Railway),

Defendant.

Order to Transmit Original Exhibits.

For the reason that it appears to the Court that

on a review of this case upon the writ of error, it will be necessary for the Appellate Court to inspect the original exhibits introduced by the respective parties on the trial of this cause, it is ordered by the Court that the Clerk transmit all of said original exhibits to the Circuit Court of Appeals, together with a transcript of the record herein.

Done in open court this 8th day of February, A. D. 1922.

R. S. BEAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Feb. 8, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [70]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 2905.

AMERICAN SILK SPINNING COMPANY,
Plaintiff,

vs.

DIRECTOR GENERAL OF RAILROADS (Operating Chicago, Milwaukee & St. Paul Railway),
Defendant.

Defendant's Bill of Exceptions.

BE IT REMEMBERED, that pursuant to stipulations in writing, signed by the parties and on file, on the 28th day of October, 1921, at the courtroom of the United States District Court in the city of Seattle, this cause came on for trial before Honorable Robert S. Bean, United States District Judge for the District of Oregon, assigned to preside in this Court, without a jury, a jury having been waived by a stipulation in writing on file; the plaintiff appearing by its attorneys, J. M. Richardson Lyeth and Bruce C. Shorts, of the firm of Ballinger, Battle, Hulbert & Shorts, and the defendant appearing by his attorneys, George W. Korte and C. H. Hanford.

And thereupon, testimony was introduced, exceptions taken and proceedings had as follows: [71]

Testimony of Frank G. Taylor, for Plaintiff.

To prove the issue on the part of the plaintiff, FRANK G. TAYLOR was sworn as a witness and gave the following testimony:

Q. (Mr. LYETH.) Mr. Taylor, what is your business?

A. I am the General Agent of the Firemen's Fund Insurance Company.

Q. Does that Company do a marine insurance business? A. Yes.

(Testimony of Frank G. Taylor.)

Q. Have you, in the course of your business had experience in handling damaged cargoes?

A. I have.

Q. Damaged by sea water? A. I have.

Q. What kind of cargoes?

A. Well, almost all kinds of cargoes.

Q. Did you have anything to do with the consignment of Canton steam silk waste that has been wet on the "Canada Maru"? A. Yes.

Q. Arriving in August, 1918? A. I did.

Q. What did you have to do with that?

A. I represented the Board of Underwriters of New York.

Q. And were you requested by the Board of Underwriters of New York to represent the Underwriters and the owners of this silk?

A. I was requested by the Atlantic Mutual Insurance Company, who are members of the Board of Underwriters of New York, to do that.

Q. To—

A. (Interposing.) To represent the Underwriters and owners in that business.

Q. When did you first see the silk?

A. I went over to Tacoma on the 12th of August, on Monday. [72] The ship, as I recollect, had begun to discharge that morning at eight o'clock.

The COURT.—When was that; what date?

A. (Continuing.) August 12th. I went in to see Mr. Cheney of the Milwaukee Road. I told him

(Testimony of Frank G. Taylor.)

that we were very anxious indeed to have a quick dispatch of this silk and that it was very important that it reached destination as quickly as possible.

The COURT.—Who was it that you told about the quick dispatch?

The WITNESS.—Mr. Cheney of the Milwaukee road.

Q. (Mr. LYETH.) Did you say anything to Mr. Cheney about the necessity of getting the silk forwarded in the wet condition?

A. I did. I told him that it was most important that the silk arrive at destination wet. Shall I go on?

Q. Go ahead.

A. I asked Mr. Cheney if it would be possible to forward the silk by silk train service, and he said that it would. I asked him if it could go in refrigerator-cars and he said that it could. After that we talked generally, possibly, for a few minutes and then Mr. Cheney and I walked down to the end of the wharf. The silk was coming out of the ship at that time and was piled between the two warehouses, between No. 1 and No. 2. By piling, I do not mean to say that one bale was on the top of the other. It was standing on end. We looked over the silk and looked over some of the other cargo that was coming out, and then walked back to the office—to his office. When we got back to his office I asked Mr. Cheney what it would cost to send that

(Testimony of Frank G. Taylor.)

by silk train service, and he told me that it would be $7.50 per hundred, as against $1.75 for the bill of lading rate.

Q. $1.75 had been prepaid?

A. $1.75, as I understand it, had been prepaid; and I inquired regarding the cost of refrigeration, and he told me that it would [73] cost, approximately, $21.00 a car—the icing. I discussed with Mr. Cheney the importance of keeping the cargo wet while it was on the wharf and en route, and it was arranged to have a man go there and hose it down, and that was done, and I left Mr. Cheney then and I went back to Seattle.

Q. Did you examine the condition of the silk at that time? A. I did.

Q. What was its condition?

A. Why, it was very dirty. It was covered with beans and other commodities that were in that No. 1 hold. It was warm, but there was nothing to worry about, and I never thought anything about it, and I never mentioned the question of it being warm.

Q. That is, Mr. Cheney did not mention the question?

A. Neither of us mentioned it. I suppose we had both seen a great deal of that kind of cargo and thought nothing of it.

Q. When did you next visit him?

A. I went over to Tacoma on the 14th. I went over there that day to see just how things were

(Testimony of Frank G. Taylor.)

getting along, and everything was all right; progressing. Mr. Cheney told me that the cars had been ordered to be brought in shortly. I went down and looked at the silk with Mr. Cheney, and some of the bales, the heat had gone out of the bales entirely; others were still warm; and I went back to Seattle again.

Q. Then, when did you next—

A. (Interposing.) I went over on the 16th.

Q. What happened then?

A. I went over on the 16th, figuring that I would find the cars loaded and ready to go out. I went and called on Mr. Cheney and was told that Mr. Wilkinson, whom I understood to be the assistant freight agent of the Milwaukee road in Chicago, had been there on the day previous and I don't know whether he stopped the loading of the cars, but he said that they could [74] not go forward.

Mr. KORTE.—You mean the assistant freight agent or the assistant claim agent?

A. The assistant claim agent, yes.

I was very much surprised and expressed myself to Mr. Cheney that way, who told me that he could do nothing, and suggested that I see Mr. Alleman.

Q. Did anyone go over there with you that day from Seattle?

A. Captain Wheeldon, from New York, was with me that day.

(Testimony of Frank G. Taylor.)

Mr. KORTE.—What day was this that the captain was with you?

A. The 16th. I looked at the silk on that day.

Q. (Mr. LYETH.) What was its condition?

A. The condition was—the silk that was on the wharf was practically cool—some bales that showed evidences of heating, but nothing disturbing. The cars—as I remember there was three cars loaded.

Q. Three refrigerator-cars?

A. Three refrigerator-cars on the siding loaded that had just been wetted down. I went over and felt of the bales in the car and they were cool.

Q. What, or approximately what, proportion of the cargo of wet silk had been loaded into the refrigerator-cars?

A. To the best of my recollection, I would say that something over a half.

Q. Well, you say you went to see Mr. Alleman?

A. Yes; I went to see Mr. Alleman and Mr. Alleman told me that the only one that could overrule Mr. Wilkinson was Mr. H. B. Earling, the vice-president of the road in Seattle.

Q. And what did you next do in that connection?

A. I went back to Seattle, or I came back to Seattle and on the 17th I went up to Mr. Earling's office in the White Building. [75] I was told that Mr. Earling was out of town, and was referred to Mr. Barkley, his assistant.

Q. What conversation did you have?

(Testimony of Frank G. Taylor.)

A. I went in to see Mr. Barkley and went over the whole situation with him; telling him how I had gone over to Tacoma—that I was one of the first ones to get there and we had been promised prompt dispatch, and the importance of getting this silk east as promptly as it possibly could get there, and told Mr. Barkley that we would be willing to pay the expenses of one man, or two men, to accompany that shipment east for the purpose of keeping it wetted down, and inspecting it at the stations, if necessary, and for icing, to see that it was properly iced. I told him that we would also be willing to give the railroad company an undertaking to hold it harmless for any further damage that might occur to the silk waste by reason of its having been forwarded in its present condition. Mr. Barkley told me that he would communicate with Mr. Earling. I told him also that if he would telephone over to Tacoma I was very sure that Tacoma would confirm what I said as to the heat diminishing in the bales.

In a few minutes Mr. Barkley left me, excused himself and went out of the office, and I was there at that time, possibly fifteen minutes, when he came back and I asked him if he had telephoned over to Tacoma, and he said that he had and that they confirmed what I said regarding the diminishing of the heat in the bales; and I left Mr. Barkley then, waiting for him to report to me after he had heard from Mr. Earling.

That was on the 17th. On the 19th I called on Mr. Barkley again. He had heard nothing from

(Testimony of Frank G. Taylor.)

Mr. Earling. On the 20th I called on Mr. Barkley —he had heard nothing then.

On the 21st I called on Mr. Barkley, and he told me that [76] the road had decided to forward this freight—to forward the waste; and on the 22d—

Q. (Interposing.) This was the day following?

A. The day following, I went over to Tacoma again and saw Mr. Cheney and arranged for the forwarding of the silk in the manner that we had previously arranged.

Q. Did you see the silk on the 22d?

A. I saw the silk, yes, on the 22d I saw the silk.

Q. How was it with respect to heating?

A. The silk, to the best of my recollection, at that time had been discharged from the refrigerator-cars and was lying on the platforms between the two warehouses. It was the same as it had always been; some of the bales were warm; others cool; some showed some evidences of heating, but there was nothing disturbing about it.

Q. Will you state whether or not in your opinion, this silk showed greater or less evidences of heating than other cargoes that you have had experience with.

Mr. KORTE.—I do not think that any comparison can be drawn by the witness. We do not know what the other cargoes were—if they were silk cargoes, it might be all right, but if they are other materials—

The COURT.—The question is rather general.

Q. (Mr. LYETH.) Would you compare the

(Testimony of Frank G. Taylor.)

heating in this silk waste with other cargoes, specifying the cargoes which you have had experience with?

Mr. KORTE.—I do not think he can draw a comparison; he can state what the condition of this was and of the other cargoes.

The COURT.—Well, he can go on and state as an expert. [77]

A. I have had considerable experience with rice, with beans, with tea and I must say that I have seen anyone of those commodities much warmer than the silk was.

Q. With those commodities have you ever had any apprehension, or ever experienced any apprehension of damage from spontaneous combustion?

A. Not at all.

Q. After the 22d, what next conversation did you have with the officials of the road?

A. On the 23d, the following day, Mr. Barkley telephoned my office that the road had definitely decided not to forward.

Q. Was that the 23d or the 24th?

A. That was the 23d of August.

Q. What did you do; did you go to his office?

A. I went to his office. I was considerably disappointed and I went to his office, and I remember distinctly asking him if he would not take it hot, if he would take it cold and I asked him if the road would accept the shipment cold.

Q. He telephoned you?

A. He telephoned me and I went up to his office.

(Testimony of Frank G. Taylor.)

Q. Immediately? A. Yes.

Q. And then you discussed whether or not they would forward it in its present condition, did you?

A. Well, he told me distinctly that they would not; that they refused to forward it. I then asked him if they would take it frozen.

The COURT.—Take it what?

The WITNESS.—Frozen.

Q. Did you say anything to him with reference to the responsibility of the road for their refusal? [78] A. I did.

Q. What did he say?

A. I told him that, undoubtedly, this would result in a claim for damages against the road.

Q. Going back to your conversation with Mr. Cheney on the 12th; did you say anything to him about the necessity of keeping the silk wet?

A. I did.

Q. And what the effect would have been if it was allowed to dry out?

A. I do not know what it would have been if it was allowed to dry out; but I was instructed to keep it wet.

Q. Well, then, after your conversation with Mr. Barkley regarding the freezing, what did he say?

A. He said he would look into it and let me know.

Q. Did he subsequently let you know?

A. He did. I think it was the day after he notified me that the road would accept it frozen.

Mr. KORTE.—What was your answer?

(Testimony of Frank G. Taylor.)

The WITNESS.—He said that the road would accept the shipment frozen.

Q. Did you shortly after take steps to try to have it frozen?

A. I did. I went to see Mr. Meyers of the Carstens Packing Company. Mr. Meyers said that he would freeze the silk for us in Seattle, and he subsequently reported to me that the Pure Food people would not allow them to use their meat chambers to freeze the silk.

Q. Then did you make any further efforts?

A. Yes; Mr. Meyers and I discussed the matter, and he said he thought he could get it done in Tacoma, and he finally made arrangements with the Pacific Cold Storage Company in Tacoma to [79] freeze the waste, and on the 29th the waste was loaded into cars.

Q. What kind of cars?

A. Ordinary freight-cars, and taken—switched over to a siding alongside of the Pacific Cold Storage Company.

Q. Did you see it there? A. I saw it there.

Q. Loaded in the freight-cars? A. Yes.

Q. Well, did the Pacific Cold Storage Company freeze it?

A. 27 bales were taken out of one car, when there was some difficulty between Meyers and the Pacific Cold Storage Company as to the price.

Q. Did they refuse to freeze it?

A. I could not say that.

Q. What did you then do?

(Testimony of Frank G. Taylor.)

A. Well, there was nothing left for me to do then but to try to dry it, and I made arrangements with the same man; with this Mr. Meyers, to dry the waste. The cars were then switched over to the Pacific Oil Mills in Seattle.

Q. The same cars? A. The same cars.

Q. Had it been unloaded from the cars?

A. Had it been unloaded?

Q. Yes. A. No; it had not been unloaded.

Q. And what happened in Seattle?

A. Well, the cars arrived in Seattle, to the best of my recollection, on the 2d of September, for we were not allowed to open the cars because of the Customs restrictions—they claimed that we did not have the proper license, and it remained [80] in the cars until the 7th day of September, when the Customs released the cars to us. It was then unloaded and the drying commenced.

Q. So that it was in the ordinary boxcars from the 29th day of August until the—

A. Until the 7th day of September.

Q. Until the 7th day of September? A. Yes.

Q. Will you state what the condition of the weather was during that period?

A. It was the hottest weather that we had had during the season.

Q. How was the silk attempted to be dried?

A. Well, they erected racks made of two-by-fours and opened up the bales and pulled them out and threw it over those racks to dry it.

Q. Outdoors? A. Outdoors.

(Testimony of Frank G. Taylor.)

Q. In the open? A. Yes.

Q. How long did it take to dry the silk?

A. It took from September 7th until January 30th of the next year.

Q. What kind of weather did you have?

A. All kinds; rain, sunshine and fog.

Q. Why did it take so long to dry the silk?

A. Well, we would have one good day with a good breeze and lots of sun, and in the evening the fog would come in and spoil all of the work they had done during the day. Other days it would rain.

Q. So that you would dry it and it would get wet again?

A. We would dry it and it would get wet again.

Q. And then it would dry and it would get wet again? [81] A. Yes.

Q. Under what arrangements with Mr. Meyers was the silk dried?

A. He agreed to dry it for five thousand dollars.

Q. Did you pay Mr. Meyers that sum for drying it out? A. I did.

Q. What was then done with the silk after it was dried? A. Shipped East to destination.

Q. Under the same bills of lading?

A. Under the original bills of lading.

Mr. LYETH.—That is all; you may inquire.

Cross-examination.

Q. (Mr. KORTE.) Mr. Cheney was at the docks; that was his office, was it not? A. Yes.

Q. He was not the General Freight Claim Agent in Tacoma, was he? A. I could not say.

(Testimony of Frank G. Taylor.)

Q. You knew Mr. Alleman, didn't you?

A. I met him that day. I did not know him before.

Q. And he was one with whom you dealt finally with reference to this silk?

A. I had very little dealing with Mr. Alleman.

Q. Did he not tell you who he was?

A. I knew who he was.

Q. What did you think he was? A. The Agent.

Q. Of what? A. The Milwaukee road.

Q. What agency did he have — general agency there, or simply a dock man?

A. Well, I knew him simply as the Agent of the Milwaukee road at Tacoma. [82]

Q. The man having authority to deal with the subject that was before you?

A. I presume that he did.

Q. Now, Mr. Cheney you found at one of the docks?

A. At Milwaukee No. 1, in the office.

Q. That is the dock down at the waterfront?

A. That's right.

Q. You know where the General Offices of the Freight Department are in Tacoma; they are up town, are they not? A. I could not tell you.

Q. Your first talk was with Cheney? A. Yes.

Q. You do not know what position he held, except that you had a talk with him?

A. I talked with Cheney.

Q. You told him you wanted to see the cargo as it came out of the ship? A. I did.

(Testimony of Frank G. Taylor.)

Q. It had not all come out at that time when you were there on the 12th? A. No, sir.

Q. A very small portion of it had only come out?

A. I would say that, possibly, 200 bales.

Q. That would be the top bales? A. Yes.

Q. Just at the hatch? A. Yes.

Q. And as they came out they did not appear to you to be heated very much?

A. Not to disturb them at all.

Q. I am speaking about heating now.

A. No. [83]

Q. They were not heating then very much?

A. Not very much; no.

Q. And in the light of seeing them, then you went to Mr. Cheney and asked that they be sent by fast passenger service?

A. No, I went and saw Mr. Cheney first.

Q. Now, let me get this right. You saw part of this cargo coming out of the hold of the ship?

A. I did.

Q. And it did not appear to you to be heated very much at that time? A. Not at all.

Q. And you then went to Mr. Cheney?

A. No, sir; I went to Mr. Cheney first.

Q. Before you saw the cargo?

A. I went to Mr. Cheney first, and Mr. Cheney and I walked down and saw the cargo together.

Q. You saw it together? A. Yes.

Q. And you looked at what came out at that time, the two of you?

(Testimony of Frank G. Taylor.)

A. We naturally looked at what came out of the boat.

Q. And it did not appear to either one of you that it was heating very much?

A. It never was mentioned between us.

Q. You did not mention anything at all about the heating? A. No, sir.

Q. And so all that appeared to you at that time was that it was saturated and soaked with the sea water on account of the wreck? A. Yes.

Q. And then Mr. Cheney went back to his office, and where did you go? [84]

A. I went back with him.

Q. And then you talked about sending it forward? A. Yes.

Q. And Mr. Cheney then told you, without any further knowledge of the cargo, right then and there, that he would have it sent through fast passenger service in refrigerator-cars?

A. Mr. Cheney told me that in the first place.

Q. Before you went down?

A. Before I went down.

Q. What were you talking about when you came back to the dock?

A. On my coming back in the dock with Mr. Cheney, I suppose we shook hands and I went home.

Q. Now, when you speak of refrigerator-cars, and sending it forward on refrigerator-cars, of course it would be on ice with the vents open?

A. In ice.

(Testimony of Frank G. Taylor.)

Q. Did he say iced? A. Yes.

Q. Iced?

A. Yes. We were to pay $21.00 a car for icing.

Q. You ice silk in its normal condition?

A. No.

Q. Then why would you call for icing when there was nothing alarming about the silk at the time that you asked that it go in fast passenger service?

A. In order to keep it as wet as possible and cool as possible.

Q. To keep it as cold as possible? A. Yes.

Q. Will you tell the Court how you could wet it down in the refrigerator-car?

A. I suppose you could open it up the same as you would when you [85] were loading it.

Q. Squirt water in it?

A. I suppose so, of course.

Q. And that is the kind of wetting that you wanted done?

A. That is the kind of wetting that I wanted done.

Q. Merely sprinkling the inside as best you could?

A. Turn the hose on the silk in the car and wet it down, the same as was done over at the dock.

Q. Sprinkle it on the top?

A. I don't know whether it was sprinkled on top.

Q. Naturally you could not get the water inside between the bales?

A. Yes; because we arranged to build up those bales so that there would be a space between the bales to allow the water and the air to circulate.

(Testimony of Frank G. Taylor.)

Q. In the cars? A. Yes.

Q. How many cars would it take to do all that—to ship that silk in the manner which you have in mind, as against the ordinary manner that it would go?

A. I think, to the best of my recollection, I think we figured on five cars.

Q. Five cars—and ordinarily there would be only about four cars of silk?

A. Depending on the size of the cars.

Q. Well, take your ordinary car that is used, which you use, or which you say you are acquainted with that is for the shipping of silk—in which silk is shipped, there would be but four carloads of silk—the bales could have been carried in four cars? A. The 867 bales.

Q. There was 133 went forward untouched? [86]

A. Yes.

Q. Well, the 867 bales, four cars would contain them all?

A. Four cars would contain them all.

Q. And it would take five cars if you wanted them placed so that you could leave places in between and build them up so that one would not touch the other? A. I would say so.

Q. Is that the way you wanted it done?

A. Yes, to put pieces of boards in between the bales.

Q. That would require a special service for the carrying of this cargo?

A. Well, we agreed to pay for that special service.

(Testimony of Frank G. Taylor.)

Q. And you would have to pay for that special service? A. We would.

Q. And it would be considerable, in the way of piling those bales in the car as you wanted them—it would cost considerable to load that car that way as against the ordinary car?

A. I presume that it would cost more.

Q. Then you would have to have men go along to sprinkle those cars while en route, would you not? A. We agreed to pay for that.

Q. Whether you agreed to pay it or not, that would have to be done, would it not? A. Yes.

Q. That was also a special service, for which you would have to pay specially, would you not?

A. Yes.

Q. And then you asked that it go in the fast train service? A. Yes.

Q. You say that Cheney was the one who said that it would go in that service? A. He did. [87]

Q. But not Alleman?

A. I never discussed it with Alleman.

Q. Or with Wilkinson?

A. I never saw Wilkinson.

Q. That was the man that was there from Chicago? A. I never saw him.

Q. You never talked to him at all?

A. I never talked to him at all.

Q. Why did you want it wetted down?

A. Because I was instructed by my people to keep the bales wet.

(Testimony of Frank G. Taylor.)

Q. Well, what was your own judgment on it; having seen it?

A. My own judgment was that, from the little experience that I had with silk, that if it was once wet that it must be kept wet until it was handled.

Q. Was there any particular reason for keeping it wet? A. I think there is.

Q. What is the reason?

A. The reason is that it keeps the gum on the silk.

Q. That is it? A. The natural gum.

Q. So that was the purpose of wetting, if it was wet, was to keep the natural gum on the silk?

A. If the gum goes off the silk, I understand that silk is badly damaged.

Q. Is it not a fact, if you know anything about silk culture at all, that the way they degum it is by saturating it in water and keeping it there?

A. I don't know that.

Q. Then you are ignorant of that part of the matter, and you knew nothing about what the action of the water was, except you thought it would keep the gum on the fiber? [88]

A. That is right.

Q. You did not have it in mind at all that the wetting down was to keep it from heating?

A. It would naturally keep it cool.

Q. Was not that the purpose of your putting water on it? A. No, not at all.

Q. —in your mind?

A. No, that is not it at all.

(Testimony of Frank G. Taylor.)

Q. It was not in your mind then that the wetting was to keep it cool?

A. Wetting would keep it cool, naturally.

Q. You would want those bales piled one on the top of the other, with pieces between so that you could get circulation?

A. To keep it cool, and to keep it wet.

Q. Then it was heating, if it had to be kept cool?

A. I don't know that it was heating; I know that it was hot.

Q. You know it was hot?

A. I know it was hot.

Q. And it was heating more the second time than the first time?

A. No, it was less the second time than the first time.

Q. Did you examine it critically?

A. I put my hands on it.

Q. Where?

A. Out on the wharf and in the cars.

Q. Where on the bales did you put your hand?

A. Do you want to know?

Q. In between, or on top?

A. I put it on the top and in between; and we pulled open some bales and took it down as far as we could, Captain Wheeldon and myself, and it was cool.

Q. The bales inside were cool. [89]

A. Yes, sir, as far as we got down it was cool.

Q. Were you there when those three cars which

(Testimony of Frank G. Taylor.)

you mentioned—there were really only two—were you there when those cars were unloaded?

A. I was not.

Q. Did you see the two or three cars loaded?

A. Well, they were being loaded.

Q. After they were loaded? A. I did.

Q. Did you see the doors closed on them?

A. I did not.

Q. When was it that you saw them—what day was it? A. I saw them on the 17th.

Q. That was the first time then that you saw those cars?

A. That was the first time I saw those cars—those refrigerator-cars.

Q. You say they were loaded then?

A. They were loaded then.

Q. Well, of course, you might be mistaken as to the date? A. I meant on the 16th.

Q. They unloaded them on the 16th?

A. It was the 16th I was over there.

Q. And when you were over there, were the two, or the three, refrigerator-cars, loaded or unloaded?

A. They were loaded.

Q. Were the doors closed when you saw them?

A. The door was open.

Q. They had opened the doors?

A. The door was open, and they had just been wetted down—the car I saw open was wetted down.

Q. They were wetting them down to keep them cool? A. Partly. [90]

Q. Apparently they had grown hot?

(Testimony of Frank G. Taylor.)

A. Well, all that kind of stuff will get warm.

Q. Now, let us talk about degrees of warmth; there is warm and warmer; would not they get warmer and would not the heat increase as the time goes on? A. No.

Q. Do you think bacterial action goes downhill instead of uphill? A. I know it will.

Q. —when heat and moisture co-operate?

A. Yes.

Q. Then, you talked again to Cheney when the cars were standing there with the doors open; and how long did you remain there on the 16th; that is when you were there with Captain Wheeldon?

Mr. LYETH.—He did not say that he talked to Mr. Cheney when the doors were open.

Mr. KORTE.—Well, when was your next talk with Mr Cheney—I think you said you were there on the 12th, the 14th and the 16th with Captain Wheeldon? A. Yes.

Q. Did you have any talk with anyone at that time?

A. It was on the 16th that Mr. Cheney told me about Mr. Wilkinson being there on the day previous.

Q. Now, I will go over that again—you said you were there on the 12th and then you went back to Tacoma on the 14th? A. That's right.

Q. And then again on the 16th? A. Yes.

Q. At that time you were there with Captain Wheeldon, did you have any talk with anyone there on the 16th as to what was being done with

(Testimony of Frank G. Taylor.)

the shipments of the silk, Mr. Taylor, either the 16th or the 17th? [91]

A. It was the 16th—that was the 16th.

Q. That was when you found the refrigerator-cars loaded and the doors open; did you have any talk with anyone there at that time?

A. That was the time that Mr. Cheney had told me that Mr. Wilkinson had been there.

Q. Mr. Wilkinson had been there, and what happened?

A. And that he had refused to allow it to go forward.

Q. Did he say why?

A. Because he was afraid it would set fire to the train.

Q. Did he discuss it with you at that time, and is it not a fact that he went over it with you, that it was heating to the extent that it looked to them that it was going to burn.

A. I do not remember that he did at all.

Q. Anyway, he did mention to you that the reason why they would not take it on was because—

A. (Interposing.) He told me—

Q. (Continuing.) —because of the heating and that it looked like there would be spontaneous combustion?

A. He told me distinctly that Mr. Wilkinson had claimed that the waste was in such condition that if shipped it would be likely to set fire to the train.

Q. And, naturally, you discussed why he thought that? A. Yes, undoubtedly we did.

(Testimony of Frank G. Taylor.)

Q. And that he evidently said to you that it was heating and hot and fuming and smoking?

A. No; he never said anything to me about smoking.

Q. Did you examine into it as to what it was doing?

A. I went down and looked at it.

Q. At the cars? A. At the cars. [92]

Q. And they were then sprinkling it down with water?

A. No; it had just been sprinkled, and I went over and put my hand on the bales, and they were cool.

Q. That is, you reached into the car?

A. I reached into the car; there was one car, as I remember, that the door was open.

Q. And did you notice the other car with the door closed, as to whether it was smoking through the vents of the car? A. No, I did not.

Q. You did not notice that condition? A. No.

Q. Then you went over to see Mr. Barkley, after the 16th? A. On the 17th.

Q. And you had a talk with him about it and you told him why they would not carry the cargo forward, did you?

A. I told him just what Mr. Cheney had told me that Mr. Wilkinson said.

Q. And you told him the reason why?

A. I did.

Q. That it would be apt to heat too hot and burn up? A. —and set fire to the train.

(Testimony of Frank G. Taylor.)

Q. And then you suggested to him that it be cooled and this special service be rendered?

A. I did not suggest to Barkley—that was all arranged with Mr. Cheney.

Q. What did you suggest to Barkley?

A. I simply told him what the arrangement I had with Mr. Cheney was.

Q. About shipping it in the special service?

A. Special silk train service and in refrigerator-cars. I told him that we would be willing to pay the expenses of one or two men. [93]

Q. Whatever special trouble they would have to go to in forwarding it in the silk train? A Yes.

Q. You appreciated it could not be forwarded except to give that special service?

A. I did not.

Q. Why did you ask for it then and were willing to pay it?

A. Because that was the suggestion that was made to me from the east, to keep it wet all of the way along.

Q. I say, in connection with that, you appreciated that it would cost more to send it through wet than if it had been dry? A. I did, surely.

Q. Than if it had arrived there dry and went through on the original bill of lading? A. Yes.

Q. And then did not Mr. Barkley inform you at that time in relation to this special service that he had counselled with the Legal Department and they told him that it would be unlawful under the Federal Act to give you that service?

(Testimony of Frank G. Taylor.)

A. He did not.

Q. After you had the talk with Mr. Barkley and it developed that a man should be sent to examine it, someone who had experience in cargoes, you suggested that he look into it and see whether it was fit for shipment—that was the talk you had with him?

A. I told Mr. Barkley that we would be very glad indeed to pay the cost of inspection of that waste in its present condition by someone competent to judge silk.

Q. You left it to him then to go ahead and arrange for it?

A. That was all that was said. There was no arrangement made.

Q. Well, what was the purpose of your statement to him? [94] A. Just a statement.

Q. You knew that he went out and arranged with Balfour-Guthrie's man? A. I was not notified.

Q. Were you not notified afterwards?

A. I never knew of it afterwards until I got the bill for $55.

Q. And you paid the bill?

A. I paid the bill—under protest though.

Q. After that occurred, when you had the conversation with Mr. Barkley about having the cargo surveyor, or someone of experience, examine into the condition of the cargo, to see whether it was fit for shipment and would go without burning up the train, you went away, did you, then from Mr.

(Testimony of Frank G. Taylor.)

Barkley, or did you still linger there and have a further conversation?

A. No. I went away. He was to consult with Mr. Earling.

Q. And finally he had gotten the report from Mr. Ayton, and he sent you that report?

A. No; the report came to me.

Q. Direct from Balfour-Guthrie—well, that is immaterial, but you did get Mr. Ayton's report?

A. In time; I would say it was considerably after he had declined to take the shipment.

Q. That this report came in? A. Yes.

Q. And you received it? A. Yes.

Q. Then when it was finally refused by Tacoma you said the only thing you could do was to take the cargo back? A. No, I did not say that.

Q. Well, you took the cargo then from the possession of the railroad? [95] A. I never did.

Q. Well, how did you get it over to the Pacific Oil Mill Company?

A. I asked the railroad to send it over there.

Q. Anyway, you directed the Railroad Company to ship this cargo first to the Pacific Cold Storage Company in Tacoma—is that the name?

A. Yes, the Pacific Cold Storage Company.

Q. And they opened the cars at that time and took out some bales—27 of them?

A. That's right.

Q. No attempt was made at refrigeration?

A. I think some twenty bales were put into the cooling chamber.

(Testimony of Frank G. Taylor.)

Q. They refused anyway to freeze it because it would contaminate the meat cells into which they were put? A. No.

Q. What concern was it that refused on that account?

A. It was the Carstens Brothers in Seattle. They did not refuse it, but the Pure Food people stepped in.

Q. You would imagine that the Pure Food people did not step in because it was wholesome, do you?

A. I did not testify that stuff was wholesome.

Q. It was smelling pretty badly at that time?

A. Well, it was no geranium.

Q. You could not get your nose into the car and keep it there very long?

A. Well, I would not want to.

Q. It smelt worse than any privy you can imagine? A. No.

Q. Ammoniacal fumes were coming off, like from a manure pile?

A. I got no ammonia fumes at all. [96]

Q. You did not?

A. —until the stuff was brought over to the Pacific Oil Company.

Q. And you got it then?

A. I got some ammonia, certainly.

Q. And a great quantity of it?

A. I did not see it when it was opened up. I saw it after it was hanging out, but there was a smell of ammonia all right.

Q. Were you there when they first opened up the

(Testimony of Frank G. Taylor.)

cars, when they got to the Pacific Oil Company's place? A. No, sir.

Q. You know that Mr. Meyers of the Pacific Oil Company—I am speaking of him—brought men down there to unload those cars and they refused to work for him—you know that fact?

A. I don't know that fact.

Q. You do not know of that fact?

A. I know that he had difficulty in getting labor.

Q. To unload it?

A. I think it was more due to the war conditions than anything else.

Mr. KORTE.—I move to strike out his conclusions, unless he knows.

A. Well, I don't know.

Mr. LYETH.—This is Mr. Korte's witness.

The COURT.—He is stating his conclusion.

Q. (Mr. KORTE.) And then you say that you contracted with Mr. Meyers to dry this for five thousand dollars? A. That is right.

Q. Will you itemize that account—as to why it cost five thousand dollars to dry that stuff?

A. Well, I do not know why it cost five thousand dollars, but I submitted the offer to dry it for five thousand dollars to my people, and they agreed to it. [97]

Q. Did Mr. Meyers submit to you the things he would have to do in order to dry it? A. Yes.

Q. Can you give me some of the items of the cost of the five thousand dollars that he submitted to you?

(Testimony of Frank G. Taylor.)

A. I imagine the principal item was the labor.

Q. Why would it cost so much?

A. Because it was a poor time of the year to try to dry anything, and it would take a long time to dry that stuff in the open.

Q. It was not eventually all dried in the open?

A. There was very little dried inside. They put some steam pipes into a little building—they found they were not making any headway at all in the open on account of the weather and one day he suggested to me that he put some steam pipes into a small brick building he had over there, and he put some of the stuff in there and dried some of the stuff in there.

Q. And it dried more quickly and readily than in the open? A. No, it did not.

Q. You think, don't you, that artificial heat would dry more rapidly inside than if it was outside, under the present condition of the weather?

A. Well, any time he dried it outside it dried more rapidly, but the trouble was that when night came we had either the fogs or the rain.

Q. Would you not think that when it was inside with artificial heat that it should get the moisture out?

A. You would not have the fog and the rain, but you would not get the wind and the sun.

Q. Would not the steam and the heat itself take the moisture out? A. Not at all.

Q. According to your opinion then, artificial heat will not absorb [98] moisture?

(Testimony of Frank G. Taylor.)

A. I don't say that at all.

Q. How do they dry shingles?

A. In a dry kiln.

Q. And what is it that they dry out?

A. They dry the moisture out.

Q. They dry it out of the shingles? A. Yes.

Q. Now, if you put one of these bales of silk into a dry kiln it would dry the moisture out?

A. I suppose it would, but it would kill the silk.

Q. Now, answer my question.

A. Of course it would.

Q. And you could have taken this entire cargo and have taken it out here to the dry kilns in Ballard and run two of them and put the entire amount in there and dry it out?

A. I would not think of doing such a foolish thing as that.

Q. You think that that is foolish? A. Yes.

Q. And yet steam or artificial heat will take out moisture? A. Yes.

Q. So you think the other thing was not foolish, drying it out until it was destroyed?

A. I think that was the only way it could be dried.

Q. Who told you to dry it out—the men from the East? A. I got authority to dry it out.

Q. From whom?

A. From the people I represented.

Q. They thought that was the best thing to do?

A. That was the only thing we could do at that

(Testimony of Frank G. Taylor.)

time, on account of your refusing to carry it forward. [99]

Q. Anyway, you started to dry it? A. Yes.

Q. And you were told to dry it by the people in the east?

A. I was authorized to dry it after it was reported to them that that was all I could do.

Q. And, of course, they should have known what would happen when it was dried?

A. I imagine that they must have.

Q. And they must have known if it was dried that it would injure the fiber?

A. I can't tell you that.

Q. But that is your claim, that it did injure the fiber, or didn't you testify to that?

A. I didn't testify about that.

Q. You do not know what the drying had to do with the fiber? A. No, sir.

Q. And you cannot give me any of the items that go to make up this five thousand dollars for drying?

A. Well, there was considerable lumber. There was a setting up of the racks. There was the breaking up of those bales of silk and hanging it on those racks.

Q. Did Mr. Meyers give you an estimate in advance of about what would go to make up the five thousand dollars? A. He did not.

Q. Before you allowed it? A. He did not.

Q. But merely right off the reel he said, "I will take five thousand dollars to dry them?"

A. Yes.

(Testimony of Frank G. Taylor.)

Q. And you submitted it to your people and they said, "All right?"

A. Well, I suppose they figured it on the price per bale. [100]

Mr. KORTE.—I object to what you suppose, and I move to strike out that answer as a voluntary statement. That is all.

Redirect Examination.

Q. (Mr. LYETH.) Did you make a contract with Mr. Meyers?

A. I did.

Q. Is that the contract? (Showing.)

A. That is it.

Mr. LYETH.—I offer that in evidence.

Mr. KORTE.—Let me see it, please.

(Document received in evidence and marked "Plaintiff's Exhibit No. 1-A.")

Said original exhibit is, by order of the Court, transmitted to the Circuit Court of Appeals, together with all of the original exhibits received in evidence.

Q. Mr. Korte asked you about the special man going forward with the silk; was that mentioned at your first conversation with Mr. Cheney, or was it later?

A. I would say not. I would say that was my second or third conversation with him.

Q. Did you speak about that to Mr. Barkley?

A. I offered to pay the expenses of one or two men to accompany the train to destination.

(Testimony of Frank G. Taylor.)

Q. Was that when you saw Mr. Barkley on the 17th? A. On the 17th.

Q. Was anything said prior to that time about your sending forward a man to ice and water the silk? A. Not that I remember.

Q. Who was Captain Wheeldon? [101]

A. Captain Wheeldon is a surveyor from New York.

Q. What interest did he represent?

A. He represented a cargo interest on the "Canada Maru."

Q. Did he represent any of the raw silk?

A. I think he did.

Q. Did he discuss with you the best method of handling the silk? A. He did.

Q. And what was the result of that discussion?

Mr. KORTE.—I object to that as self-serving.

The COURT.—Who is Captain Wheeldon—he was not a representative of the defendant company?

Mr. LYETH.—No.

The COURT.—I do not think it is competent then.

Q. (Mr. LYETH.) Was he representing other cargoes than the cargo that is represented in this suit? A. Yes.

Mr. LYETH.—If your Honor please, he was not representing our interest.

Mr. KORTE.—Nor the defendant's.

The COURT.—I understand that.

Mr. LYETH.—Do you sustain the objection.

(Testimony of Frank G. Taylor.)

The COURT.—I do not understand the theory upon which you offer his declarations or statements. Captain Wheeldon was not representing either of the parties in this litigation, was he?

Mr. LYETH.—No, sir, it was simply to show where Mr. Taylor got the idea of forwarding the silk wet. Mr. Korte is trying to show that Mr. Taylor wanted this forwarded wet so as to keep it from taking fire.

Mr. KORTE.—I think he said his people ordered him to send it on wet. [102]

The COURT.—Well, the witness can state how it came that he got the idea, or how he came to suggest sending it on wet.

A. My reason for asking to have it forwarded wet and to keep it wet, was by reason of a telegram that I got from my people in New York, asking me to keep it wet, and it was Captain Wheeldon who suggested that it be forwarded in the refrigerator-cars and iced.

Q. (Mr. LYETH.) Did you notice any smell of ammonia coming from the bales when they were on the dock? A. I did not.

Q. Now, Mr. Taylor, will you just relate how the question of having some competent surveyor or competent man experienced in silk, look at the cargo, came up in your conversation with Mr. Barkley? A. Why, I brought it up myself.

Q. Was this after they had refused to forward it?

A. This was after Mr. Wilkinson had refused to forward it, and I was talking with Mr. Barkley on

(Testimony of Frank G. Taylor.)

the 17th and I brought it up myself. I told him that we would be very glad indeed to pay the cost of inspection by some competent party; someone familiar with silk who would go over to Tacoma and look at that silk and report to him. I made that statement. He made no reply to me. I never even knew who was going to go, or that he thought of getting anybody. I simply made that statement to him.

Q. Did you ever hear of Mr. Ayton in connection with this case?

A. I never heard of him at all until I saw the bill.

Q. And do you remember, approximately, what date you received that bill?

A. No, I do not. [103]

Q. Would it refresh your memory if you saw a letter? (Showing.)

A. I think it would. (Examines letter.) I can only believe that was the day that I got it.

Q. What date? A. September 20th.

Q. You never heard of Ayton looking at this?

A. I never knew anything about it at all.

Q. —until you received the bill?

A. Not until that, not at all.

Q. And that was about September 20th?

A. September 20th.

Q. In asking for this, and arranging for this special service of silk train service and refrigerator-cars and icing; did you have in mind any danger of the silk taking fire?

(Testimony of Frank G. Taylor.)

A. I did not. It never occurred to me.

Q. Mr. Taylor, how long have you been handling damaged cargoes coming into port?

A. About thirty years.

Q. Approximately, how many damaged wet cargoes have you handled?

A. It is pretty hard to say, but I suppose five hundred—those are shipments and not cargoes.

Q. Will you state whether or not every commodity, of vegetable or of animal origin, heats when it is wet?

Mr. KORTE.—I object. The witness is incompetent. I do not think he has demonstrated that he is acquainted with that feature of the case.

The COURT.—He may answer.

A. My experience with wet cargoes has been more particularly with beans, rice, tea, burlap; and all those commodities heat. I have had beans and rice so hot that you could not put your hand on the bag, and it was a matter that would not even be [104] discussed between myself and the parties that, possibly, I was selling the stuff to—the thought of its catching fire or setting fire to a wharf, or burning.

Q. Did you have them in fireproof warehouses?

A. No.

Q. Wooden warehouses?

A. Wooden warehouses.

Q. Did any of them ever catch fire?

A. Not that I know of.

Q. Does rice get hot? A. Very hot.

(Testimony of Frank G. Taylor.)

Q. Did you observe that the silk got as hot as rice would get?

A. No; I have seen rice get much warmer than any time that I saw this silk.

Q. The various times that you saw this silk, when did it reach the highest temperature in your estimation, while it was on the dock?

A. The second day that I was over there, that was on the 14th, the bales were exposed to the sun and they were warm; some were warmer than others, but there was absolutely nothing, in my opinion, to be disturbed about. It never occurred to me that they could catch fire or that there was any danger from them.

Q. Well, at the times that you saw it after the 14th, was it hotter or colder?

A. It was cooler. At the time I saw them after the 14th was on the 16th, and that was after the men had been wetting them down in the car, and those in the car were cool. [105]

Recross-examination.

Q. (Mr. KORTE.) Then it seems that if he did not wet them they would keep on heating?

A. No, sir.

Q. Then what was the purpose of keeping them constantly wet?

A. To keep the bales wet according to instructions from the people who owned the silk.

Q. So that is all you know about the effect of the wetting—now, with reference to these bags of beans

(Testimony of Frank G. Taylor.)

and rice and burlap; how large a shipment did you have in mind that was wet?

A. There have been a great many shipments—a great many hundreds of tons.

Q. Were they wet in the hatches, due to the ship going on the rocks and staving a hole in and letting the water in, like in this case?

A. In some cases the holds were submerged and in the other cases it was salt water that came through the hatches or leaked into the ship.

Q. And what was done with the beans and rice and burlap?

A. They were put into the warehouse and the damaged portion put to one side and the sound portion put to another side.

Q. That was practically in the open?

A. In big warehouses.

Q. With free ventilation?

A. A good deal of ventilation, yes.

Q. Plenty of ventilation for any of the gases or fumes to escape, or the heat that might escape from them; it would draw it off immediately?

A. Yes.

Q. They are the warehouses you have in mind, where there was plenty of ventilation that would draw off any heat or gases [106] or fumes?

A. They were well ventilated warehouses, no doubt of that. The rice was never wetted down.

Mr. KORTE.—That is all.

Mr. LYETH.—There is one question I forgot to ask.

(Testimony of Frank G. Taylor.)

Q. There was 1000 bales in this shipment?

A. A thousand bales in the entire shipment.

Q. And do you know whether or not there were two grades of the silk?

A. I believe there was No. 1 and No. 2.

Mr. KORTE.—I think we can agree on that. That is all agreed to. There is no dispute about that.

And to further prove the issue on the part of plaintiff, the four bills of lading referred to in the pleadings were received in evidence and marked respectively "Plaintiff's Exhibits 2–A, 3–A, 4–A and 5–A," and said original exhibits are transmitted to the Circuit Court of Appeals with all the other exhibits in the case.

And to further prove the issue on the plaintiff's part, the plaintiff offered in evidence a bottle labelled "No. 1 Canton Silk Waste," which was received in evidence and marked "Plaintiff's Exhibit No. 2," and the same is transmitted to the Circuit Court of Appeals with all the other exhibits in the case.

And thereupon the plaintiff introduced and read the following deposition of EDGAR W. LOWNES: [107]

Deposition of Edgar W. Lownes, for Plaintiff.

EDGAR W. LOWNES, being duly sworn and examined as a witness for the plaintiff, testified as follows:

1 Q. (By Mr. LYETH.) Mr. Lownes, are you

(Deposition of Edgar W. Lownes.)

the president of the American Silk Spinning Company, the plaintiff in this action? A. I am.

2 Q. How long have you been president, approximately? A. Approximately ten years.

3 Q. Were you before that time engaged in the spun silk business? A. I have been.

4 Q. For how long? A. Thirty-one years.

5 Q. That has been your only business practically?

A. Well, several years I was in the dress-goods business.

6 Q. And for the past thirty-one years you have been continuously in spun silk? A. Yes.

7 Q. And during that time you have handled Canton steam waste, what is known as the grades of number one and number two?

A. Almost continuous.

8 Q. The plaintiff company has manufactured that commodity into finished products practically continuously?

A. No. Only been in existence about eleven years, ten or eleven years. Since that time.

9 Q. What commodity do you use, what raw commodity? A. Principally Canton.

10 Q. Steam waste? A. Steam waste.

11 Q. And you have been using that for the past eleven years with this company?

A. Yes. [108]

12 Q. Do you remember a consignment of one thousand bales of Canton steam silk waste which were shipped on board the steamship "Canada

(Deposition of Edgar W. Lownes.)

Maru'' and consigned to the following bankers, Goldman, Sachs and Company and Heidelbach, Ickelheimer and Company?

A. Yes, I remember it.

13 Q. Did you actually pay for that silk and were the bills of lading endorsed to the American Silk Spinning Company? A. Yes.

14 Q. I show you copies of bills of lading covering those shipments. Do they correspond to the description of the shipments as you remember them? A. As I remember them, yes.

15 Q. Out of this shipment of a thousand bales how many bales arrived in a damaged condition?

A. 867.

16 Q. And the balance came forward sound?

A. Yes.

17 Q. Did you see the damaged silk when it arrived here in January, 1919?

A. I saw the damaged silk when it arrived. I don't remember the date of arrival.

18 Q. Will you describe the condition of the silk, the damaged silk?

A. The silk was wet and discolored.

19 Q. Had it been partially dried?

A. Partially dried; yes.

20 Q. Will you state the effect of the drying of the silk on the fiber?

A. I don't know what you mean.

21 Q. What was the condition of the silk with respect to the strength of its fiber?

(Deposition of Edgar W. Lownes.)

A. The fiber had become very much weakened. [109]

22 Q. Out of the 867 bales damaged how many bales were there of the number one Canton steam waste? A. 500 bales number one.

23 Q. And how many of number two?

A. 368 number two.

24 Q. Were you able to utilize the damaged silk in your factory? A. No.

25 Q. And what was done with it?

A. It was shipped to New York, I believe, after being held here for a while.

26 Q. Will you state, Mr. Lownes, from your experience in handling Canton steam waste whether or not in your opinion there is any danger whatsoever from spontaneous combustion when the silk is wet by salt water?

A. No, there is absolutely no danger.

27 Q. Have you had any experience with silk waste which had become wet?

A. Yes, a great deal of experience.

28 Q. Will you state what your experiences have been?

A. I have seen it wet by flood, by bursting steam-pipe, by salt water and by rain-water.

29 Q. How long has it been wet in these various cases, approximately?

A. In some cases for months; others for hours.

30 Q. In any of these cases did the silk waste take fire? A. No.

31 Q. Have you ever had foreign substances take

(Deposition of Edgar W. Lownes.)

fire in silk waste? A. Yes.

32 Q. And what has happened?

A. The foreign substance consumed itself and charred the surrounding waste.

33 Q. Did the fire go out? A. Yes. [110]

34 Q. Did the silk burn? A. Charred.

35 Q. Charred. Can you set fire to it?

A. You can char it. There is no actual combustion.

36 Q. You spoke about some pipes bursting. In the instance you have in mind did the silk waste remain against the hot steam-pipe, the wet silk waste? A. No.

37 Q. How long did the silk remain wet when the steam-pipe burst?

A. We can't tell exactly but we believe it was damaged for months.

38 Q. Was that in this factory? A. Yes.

39 Q. Was there any spontaneous combustion?

A. No.

40 Q. Was the silk packed against the steam-pipes? A. No.

41 Q. Immediately below it?

A. They were below it. The steam-pipes leaked and the water ran along the ground and wet the silk.

42 Q. That was hot water, was it? A. Yes.

43 Q. Have you had consignments of silk waste prior to the waste that is the subject of this suit coming from the Pacific Coast damaged by salt water? A. Yes.

(Deposition of Edgar W. Lownes.)

44 Q. Has there been any evidence of combustion? A. No.

45 Q. Have you ever heard of silk waste, Canton steam silk waste, igniting by spontaneous combustion? A. Not of itself, no. [111]

46 Q. Will you explain what you mean by "not of itself"?

A. I have seen foreign matter take fire and char the waste.

47 Q. You mean by "foreign matter" foreign substances? A. Cotton.

48 Q. What happens when this Canton steam waste becomes wet with either fresh or salt water?

A. It ferments and gets a little warm, gets a strong ammonia smell.

49 Q. Well, does it get very hot?

A. Never felt it very hot, no.

50 Q. Well, can you describe in any way how hot or how warm it does get?

A. Well, considerably less than 140. You can bear your hand in it, you can take hold of it without scalding yourself or burning yourself, without feeling any discomfort.

51 Q. Referring to the shipment of silk on a previous occasion which came forward wet with salt water from the Pacific Coast, will you state whether or not the silk was warm? A. It was.

52 Q. Was it hot? A. No.

53 Q. Had fermentation taken place? A. Yes.

54 Q. Referring to the shipment of silk waste from the steamer "Canada Maru," assume, Mr.

(Deposition of Edgar W. Lownes.)

Lownes, that the vessel stranded on or about August 1st and that the hold became flooded with salt water in which the silk waste was stored and that the silk was thereafter unloaded on a wharf between August 7th and 10th, 1918, and further assume that the defendant railroad company had forwarded the wet silk by silk train service and that it had been wet by hose on the wharf from time to time and had arrived at your factory between August 21st and [112] August 30th, some three or four weeks after the original wetting. Will you state from your experience what percentage of damage to the silk waste you would have experienced in putting it through your factory?

A. Five to ten per cent, plus cost of handling.

55 Q. Well, what would the cost of handling be?

A. A nominal amount compared to the value of the waste.

56 Q. And what would that have consisted of?

A. Boiling extra time and sorting the waste.

57 Q. Will you state whether or not the fiber of the silk, assuming those circumstances, that it had been wet from three to four weeks and kept wet, would have been affected to any material extent?

A. Possibly five per cent, if handled promptly.

58 Q. What would have necessitated the extra boiling that you refer to?

A. The eliminating or reducing the amount of salt water, and to help cleanse the stuff.

59 Q. Will you state briefly, Mr. Lownes, what

(Deposition of Edgar W. Lownes.)

the process of degumming silk waste is that you use?

A. The process we use is to boil it with soap and chemicals. The salt water being in the waste would prevent the soap from saponifying.

60 Q. Is there any other method of degumming waste used in foreign countries?

A. Yes, methods of maceration.

61 Q. And what is that?

A. That is to allow the silk to ferment—the gum in the silk to ferment and after fermentation it becomes easily washed off.

62 Q. But to bring about that fermentation what do they do with it?

A. They allow it to remain in lukewarm water. [113]

63 Q. State whether or not that would have been the process that would have gone forward if the silk had been forwarded as I have indicated in the hypothetical question.

A. To a large extent; yes.

64 Q. Do I understand you to mean that, if the silk had been kept wet, the fermentation process would have been going on?

A. If it had been continually wet it would have retarded fermentation, although it would have gone on to a slight extent.

65 Q. What would the effect of the fermentation that did go on have been?

A. It would have discolored the fibers to a certain extent, if not damaged it materially.

(Deposition of Edgar W. Lownes.)

66 Q. Would the fermentation attack the animal matter, the gum? A. It would.

67 Q. Will you state, Mr. Lownes, the percentage, including cost of handling, of damage to the sound silk that would have resulted if the silk had been forwarded by the defendant company as I have indicated in my hypothetical question?

A. Not to exceed five or ten per cent.

68 Q. Including the cost of handling?

A. Including the cost of handling.

69 Q. What was the sound market value of the number one and number two Canton silk which was damaged at the time in August 1918?

A. In total dollars and cents?

70 Q. Well, make it how much a pound.

A. The market value—I can give you in percentage above what it would cost what was at that time the market value.

71 Q. I mean in dollars and cents.

A. The number one was five shillings eight pence per pound. The value of that shipment at the time was $125,653.78. [114] That was five shillings six pence at the time, and the other, number two, was three shilling two pence.

72 Q. Have you that in dollars and cents?

A. Yes, I can give you the total dollars and cents in each of them. Number one was $70,502.

73 Q. And how many pounds?

A. 46,613 pounds. $1.51 for the number one and 87¢ for the number two.

74 Q. Then do I understand, Mr. Lownes, your

(Deposition of Edgar W. Lownes.)

opinion as to the value of that wet silk was ten per cent less than the market value? A. Yes.

75 Q. In August 1918? A. Yes.

76 Q. And what would the value in figures of the wet silk have been? A. $113,088.40.

77 Q. Mr. Lownes, I show you a bottle containing silk waste which Mr. R. W. Hook will testify he wet with sea water and allowed to stand in an air-tight bottle from September 24th, 1920, until yesterday, January 2d. Will you examine that silk and state whether or not in your opinion the fibre is materially weakened?

A. No, it is not. The fiber is very little affected.

Mr. LYETH.—I offer this sample in evidence.

Sample marked "Plaintiff's Exhibit 2, January 2, 1921." Exhibit withdrawn by Mr. Lyeth.

Cross-examination by Mr. KORTE.

78 Q. This shipment moved on bills of lading with a draft attached?

A. No, no draft attached.

79 Q. It was an order bill of lading?

A. Letter of credit. [115]

80 Q. Well, whatever it was, it had to be taken up somewhere?

A. The payment had been taken up.

81 Q. And the letter of credit, what we call a draft attached, came on?

A. No, never came on. Assigned to the bank and endorsed over to us.

82 Q. And you paid it then?

A. No. That was bought on a four months let-

(Deposition of Edgar W. Lownes.)

ter of credit. The shipment is made from China addressed to the bank with a four months letter of credit. That isn't due until four months after the shipment is made. The bankers give us the bills of lading on a trust receipt from us guaranteeing that if we use that silk and sell it the silk belongs to them until it is paid for.

83 Q. When did you make that payment?

A. Four months after the date of shipment, or practically four months.

84. Q And that payment, of course, was made to the bankers? A. Yes, when it was due.

85 Q. The bankers named in the bills of lading who endorsed them over to you?

A. Yes. They advanced the money to the Chinamen.

86 Q. Now, in order to move this cargo of waste silk, Mr. Lownes, from Tacoma to Providence at the time it was offered to us in the wet condition it would have to be kept wet and not allowed to dry?

A. Not necessarily.

87 Q. You would have to keep it wet to the extent of keeping down fermentation, would you not?

A. No.

88 Q. You could ship it in that condition, saturated completely, [116] and allow it to come along? A. If it came on a silk train, yes.

89 Q. We will say a silk train—that moves in how many days, six or seven days? A. Yes.

90 Q. You don't think it would ferment to any extent? A. Not enough to damage it.

(Deposition of Edgar W. Lownes.)

91 Q. Under the maceration method how long would you allow maceration to go on before you would take it out and wash it off?

A. From five days to two weeks.

92 Q. And if it is allowed to remain in the macerated state longer than that what effect would it have on the fiber? A. It would weaken the fiber.

93 Q. Because of the nonchecking of the fermentation from the heating?

A. Of the fermentation from the heating.

94 Q. Now how much did you allow by way of damage, Mr. Lownes, for the discoloration of the silk?

A. Didn't allow much of anything.

95 Q. It was immaterial to you whether the silk was discolored or not?

A. At that time it made no difference.

96 Q. You could have used it? A. Yes.

97 Q. And the damage which you claim is by reason of the weakening of the fiber?

A. The weakening of the fiber.

98 Q. Did you examine the fiber personally or have it done by others?

A. I examined it personally.

99 Q. What weakened the fiber?

A. The heat and fermentation principally. [117]

100 Q. Allowing it to go on and ferment for a long time afterwards? A. Yes.

101 Q. And not checking that fermentation?

A. Not checking it.

102 Q. Just as you have described they allowed

(Deposition of Edgar W. Lownes.)

maceration to go on? A. Yes.

103 Q. That could have been kept down by keeping it saturated or immediately boiling the silk and washing it off, washing the salt water out?

A. Yes.

104 Q. Of course as soon as you would bring the silk on here that is the very thing you would do?

A. Work night and day and save it.

105 Q. Save it by putting it into boiling hot water and chemicals, as you say? A. Yes.

106 Q. What chemicals would you use?

A. Soda, some form of soda, some potash.

107 Q. You spoke of having experience with waste silk saturated by certain waters like flood water, salt water, and so forth? A. Yes.

108 Q. And you found that it was heating, did you not? A. Yes.

109 Q. And did you find it heating to the extent of injuring the fiber?

A. Never allowed it to get that far.

110 Q. Where was it. Did you have it in an open room or in a drying room or where?

A. In an open room.

111 Q. Open room where the gases or whatever it is that results from fermentation can escape?

A. Yes. [118]

112 Q. Did you find any of it that got to the extent that it charred the fiber? A. No.

113 Q. Well, as you said, you didn't allow it to get that far before you cared for it?

(Deposition of Edgar W. Lownes.)

A. I have seen silk that has been wet for years without charring.

114 Q. That is out in the open?

A. Yes. I have also seen it in closed rooms that had been wet for years.

115. And you have noticed where it has been wet for years the fiber is finally destroyed, is it not?

A. Almost destroyed; weakened so it is not practical to use it.

116 Q. Exactly. You spoke of seeing silk waste charred in connection with being saturated. Was that due to its own fermentation or heating?

A. No.

117 Q. What was that due to?

A. Due to fire from extraneous cause.

118 Q. Heating from the outside and charring?

A. Yes. Fire inside of the bale arising from foreign matter in the bale.

119 Q. In other words, you would find inside of the bale foreign matter? A. Yes.

120 Q. Such as what, Mr. Lownes?

A. Piece of an overall, cotton wet.

121 Q. Piece of the cocoon?

A. No, never found it in steam waste.

122 Q. You do find then foreign matter in the bales? A. Not in Canton waste. [119]

123 Q. Well, you have to sort it and pick it by hand. You find straw and hair?

A. Straw and hair, yes.

124 Q. Where this is spun out or gathered it is mostly in places where they keep the goats and

(Deposition of Edgar W. Lownes.)

sheep together, and so forth,—isn't that true?

A. Yes. No, it is packed and dressed in regular, what they call go-downs, equivalent to warehouses, regular factories.

125 Q. Those places are not so clean but what you get foreign matter by way of straw and hair, and so forth?

A. The straw and hair doesn't get in there.

126 Q. Where?

A. In what they call silk filatures, they find the ends of the silk and straw, little wisps of straw.

127 Q. In one of your instances you found where there was a piece of an overall in one of the bales?

A. Not in any China silk.

128 Q. This waste silk that you said was charred by reason of heating, that you found foreign matter inside of the bale that had heated so that it charred the silk waste? A. When put in the dry ovens?

129 Q. Yes.

A. Yes. That was waste produced in American factories.

130 Q. This shipment that you had in mind that came from the Pacific Coast, was it completely saturated with salt water?

A. No. Only some bales.

131 Q. A few bales? A. Yes.

132 Q. And to what extent were they saturated?

A. I couldn't say as to that. It is sometime ago. We have had shipments, though, when bales have gone overboard and completely saturated. [120]

133 Q. Yes. Going back once more to silk waste

(Deposition of Edgar W. Lownes.)

which you say you have seen lie around for a long, long time—I think you said a year—what was the condition of the fiber eventually? In what condition did it leave it? Did it leave it in a brittle breakable condition?

A. Yes, sir; had no strength.

134 Q. Had no strength at all and you could crush it right together, could you not?

A. Oh, no, no.

135 Q. If it were dried? A. No.

136 Q. Eventually, Mr. Lownes, if it were allowed to ferment and not taken care of at all, would it not leave the fiber in what you would call a brittle condition?

A. Well, it would be brittle but not so you could crush it. It would never powder up.

137 Q. But it would have no strength at all?

A. Oh, yes, it would have strength. It would have a great deal of strength but not strong enough to make it practical to work with.

138 Q. This particular waste silk, did you attempt to wash any of it when you got it here or merely examined it and then rejected it?

A. No. We washed samples of it.

139 Q. You did wash some of it? A. Yes.

140 Q. Did you preserve any of those samples, Mr. Lownes? A. I don't think so.

141 Q. To what extent was the waste silk, when it arrived here, still heating or had it cooled?

A. Well, the outside had cooled. I couldn't say as to the inside. [121]

(Deposition of Edgar W. Lownes.)

142 Q. Well, had you broken any bales open in order to test them?

A. It didn't come in bales. Came in a large matted mass like manure, smelt very strong and I didn't want to handle it very much myself.

143 Q. You spoke of a former experience that you had in the shipments—especially the shipments from the Pacific Coast through—that there was no evidence of combustion. What did you mean by "combustion"? Did you mean a flame?

A. No, nothing. No charring.

144 Q Did you find any heating at all?

A. Yes, but not over, I should say, 120 degrees.

145 Q. What was the extent of damage of that particular shipment?

A. The damage was very small. We have had shipments come through with very few bales damaged out of a big shipment and practically no loss.

Redirect Examination by Mr. LYETH.

146 Q. You spoke about the time of the maceration period being about from four days to two weeks. Would the rewetting of the silk with new water, fresh or salt, extend the time of maceration?

A. Yes.

147 Q. In the hypothetical question that I asked you this morning with respect to this particular silk, the wetting down of the silk while it was on the wharf or the wetting of it while it was in transit in the cars, would or would not that prevent the maceration process attacking the fiber itself?

(Deposition of Edgar W. Lownes.)

A. It would, especially if the water was cold.

148 Q. Is it true that the fermenting process takes place in the animal matter, the gum?

A. Yes, what is called the sericin.

149 Q. The maceration process destroys this sericin, is that it? A. Yes. [122]

150 Q. Is that usually completely destroyed by the fermenting process before it attacks the silk?

A. No. It loosens it. The water will wash it off.

151 Q. Does the fermenting process attack the silk fiber itself before the gum is macerated?

A. Not noticeably.

152 Q. Does the salt water have any different effect on the silk, either from the point of view of possible combustion or in affecting the fiber,—any different effect than fresh water?

A. I wouldn't think so.

153 Q. The only difference would be that you would have to get the salt out before the soap could take its effect?

A. Yes. You would have to use a great deal more soap because the salt water kills the soap.

154 Q. In answer to Mr. Korte's questions this morning you spoke of a case where overalls in the bale had taken fire, cotton overalls. Was that Canton steam waste? A. No.

155 Q. What kind of waste was that?

A. What is called throwsters waste. That is waste made in the spinning factories of this country.

156 Q. State whether or not there are foreign substances found in that sort of waste.

(Deposition of Edgar W. Lownes.)

A. Yes, cotton bands, peanut shells and all that sort of thing.

157 Q. Well, then, I understand this foreign matter sometimes catches fire? A. Yes.

158 Q. And that is what happened in the case of the overalls?

A. Yes. We presume that the overalls were greasy. I don't believe clean cotton is liable to spontaneous combustion. [123]

159 Q. You spoke about silk filatures in your cross-examination. Will you explain on the record, Mr. Lownes, what that means?

A. A silk filature is a reeling establishment in a silk raising country where the silk is taken in endless strand from the cocoon.

160 Q. Does the Canton steam silk waste contain cotton? A. No.

161 Q. You don't find any cotton fragments in it?

A. No.

162 Q. You spoke about straw in the silk filatures.

A. Yes.

163 Q. Do you find that in the silk waste?

A. Very minute percentage.

164 Q. Have you ever had any experience with Canton steam silk waste having foreign materials take fire in it? A. No.

165 Q. Have you recently received some Canton steam waste from China that was wet?

A. Yes. Two bales. That is about a year ago.

166 Q. Two bales were wet?

A. Yes. Came on the steamship "Ixon."

(Deposition of Edgar W. Lownes.)

167 Q. Did that reach you promptly?

A. Yes, shipped promptly.

168 Q. Shipped promptly from the Pacific Coast?

A. Yes.

169 Q. It was wet with salt water? A. Yes.

170 Q. State what damage had been done to the fiber of the silk.

A. Well, we put the silk right through and used it up with our regular silk and apparently no damage, not enough damage to amount to anything was done to it. [124]

171 Q. Will you describe, Mr. Lownes, the maceration process of degumming? Do they use any chemicals?

A. Well, some do and some do not. There are all kinds of maceration. The old style maceration is to put the silk into water of 180 degrees and gradually allow it to cool down to 140 degrees and keep it at 140 degrees for two weeks. Some get it up almost to the boiling point to start with and it gradually comes down. They start it hot in order to hasten it. Then cover it well, keep the air from getting at it and allow it to stand for two weeks. If it falls below 140 they should warm it up a little bit. And that is all there is to it. After that it is taken out and thoroughly washed out in running water. Nowadays they put chemicals in to accelerate and help it.

Mr. KORTE.—What kind of chemicals?

WITNESS.—Little soap and soda. In order to hasten it too, they take the old water from the

(Deposition of Edgar W. Lownes.)

previous maceration and put it in with the new. And then there is another maceration where they use chemicals almost entirely and get results in about two days instead of two weeks.

172 Q. (By Mr. LYETH.) Referring to this particular shipment from the "Canada Maru," and to my hypothetical question, if the silk waste which had previously been wet with salt water were wet with fresh water—that is, additional water—from time to time, what effect would that have on the maceration process?

A. It would stop the maceration or retard it.

173 Q. The fact that in the maceration process as used abroad they start with water at 180 degrees, does that hasten the maceration process, the hot water? [125]

A. The hot water starts the heating of the germs much quicker and the heat accelerates that. You could start in cold water and the silk itself would heat the water up to possibly 110 or 115. I have never tried to warm it up itself but it would take a long time to do that and use two or three days, so they always start with warm water.

Recross-examination by Mr. KORTE.

174 Q. Then when you examined it you rejected the shipment and turned it over to the insurance company, or had they taken possession of it before that? A. No, it was in our possession.

175 Q. What did you do after you found it was worthless? Did you ship it to New York?

(Deposition of Edgar W. Lownes.)

A. Not until we were instructed to.

176 Q. By whom? By the insurance company?

A. Yes.

177 Q. And they were the ones then who sold it there?

A. Yes. We made a test similar to this one before we rejected it.

Redirect Examination by Mr. LYETH.

178 Q. Could you give any idea how much the fibre had been weakened?

A. No, I couldn't give it in terms of figures?

179 Q. Well, had it been materially weakened?

A. Yes. So much so that it wasn't commercially practical to use it,—that is, for spun silk. It could be used for something else, for making what is called a noil silk where they break the fibre up and spin it on a wool machine.

Recross-examination by Mr. KORTE.

180 Q. Couldn't you work it in with your other silk, Mr. Lownes?

A. Not without spoiling the other silk. [126]

181 Q. In what way would it spoil the other silk?

A. Our silk that we get is a very nice long silk, white and of uniform fibre. The minute you put a short fibre in with a good silk you would cause what we call slugs, or bad places, in the yarn and the short fibre would show.

182 Q. What would it be worth for use in the noil silk?

(Deposition of Edgar W. Lownes.)

A. Worth very little. Perhaps four or five cents a pound.

183 Q. What was the reason for the low price? Was it because silk had come down or the Government had no use for it any longer?

A. No. It couldn't be used in regular business.

Mr. LYETH.—You mean in spun silk?

WITNESS.—Couldn't be used in spun silk.

184 Q. Is noil silk spun then?

A. Well, it is a spun silk but the fibre is so short we couldn't use it.

Deposition of Theodose Bellinger, for Plaintiff.

And to further prove the issue on the part of plaintiff, the deposition of THEODOSE BELLINGER was introduced and read in evidence, as follows:

(By Mr. LYETH.)

Q. Mr. Bellinger, what is your occupation?

A. I am the General Agent of the Champlain Silk Mills, Whitehall and Brooklyn.

Q. Are you the factory manager of Whitehall?

A. The factory manager of Whitehall, and attend to the purchase of raw material. [127]

Q. How long have you been in that position?

A. I have been with the Champlain Silk Mills twelve years; in my present position for the last five years.

Q. Does the Company handle Number 1 and Number 2 Canton silk waste?

A. We do, at times.

(Deposition of Theodose Bellinger.)

Q. State whether or not you have had experience with number one Canton waste.

A. Yes, we have processed both number 1 and number 2 Canton waste.

Q. Have you ever had occasion to handle number 1 Canton silk waste which has been wet?

A. Yes, sir.

Q. Did that come into the factory wet?

A. Yes.

Q. State whether or not in your opinion and from your experience Number 1 and Number 2 Canton steam silk waste which has been wet with salt water is liable to spontaneous combustion?

Mr. KORTE.—I will enter my objection that the witness is incompetent to give an opinion.

A. I do not.

Q. Have you had shipments of Canton steam waste come to your factory damaged by salt water?

A. Yes.

Q. Have you observed any tendency to spontaneous combustion? A. I did not.

Q. Have you ever heard of Canton steam waste igniting from spontaneous combustion?

A. I never have.

Q. Have you at my request conducted an experiment with a quantity of Number 1 Canton steam silk waste? A. Yes. [128]

Q. Will you state what you did and what results you found?

A. On August 31 I had our Chemist at the Whitehall Mill take 15 pounds of Number 1 Steam Waste

(Deposition of Theodose Bellinger.)

and wet it with a solution of salt water, a solution he prepared containing exactly the same percentage of salt that salt water usually contains.

Q. Sea water?

A. Sea water; yes. These 15 pounds of waste were soaked 24 hours in water containing the same amount of salt as sea water. It was allowed to drain until September 2d,—to drip, which would be about three days, when it was covered with burlap bags, compressed somewhat, and allowed to stand in a moderately warm room. The temperature of the air and silk was taken daily to determine the elevation of temperature of the silk over the air. Within the first four days the elevation was only very slight, but no record was kept. The following days the temperature of the air and silk were as follows: September 7th the air was 72° Fahrenheit and the silk was 77°, a difference of 5°. On September 8th the air was 73° and the silk was 82°, a difference of 9°. The second test was made on the 8th, when the air was 75° and the silk was 82°, a difference of 7°. On the 9th the air was 84° and the silk was 95° a difference of 11°. On the 11th the air was 71° and the silk was 84° a difference of 13°. On the 13th the air was 78° and the silk was 87°, a difference of 9°. On the 14th the air was 71° and the silk was 82°, a difference of 11°. On the 15th the air was 75° and the silk was 88°, a difference of 13°. On the 17th the air was 75° and the silk was 88°, a difference of 13° and on the 18th

(Deposition of Theodose Bellinger.)

the air was 74° and the silk was 86°, a difference of 12°.

The increase in temperature so far noted is not anywhere near enough to cause spontaneous combustion, and the sample shows no sign of producing any greater elevation of temperature. [129]

Signed by G. H. Hopkins, of our mill, and the statement was verified by myself.

Q. Did you observe the temperature?

A. Yes, I observed the temperature, and observed the material when it was brought to his department to be soaked, August 31st, and while it was allowed to remain on the floor in order to determine the temperature of the material.

Q. And this was Number 1 Canton Steam Waste?

A. This was Number 1 Canton steam waste.

Q. Mr. Bellinger, previous to the time you became factory manager and general agent of the Champlain Silk Mills state what experience you had in respect to silk waste in the factory?

A. For five yeas prior to 1915 I was the Whitehall representative of the buyer for the Champlain Silk Mills, located in New York at the time, in other words I had charge of receiving the raw waste and examining it, and comparing it with the standard samples under which the material had been bought, and reported to Mr. Oscar Meyer who was at the time the Vice-President of the Champlain Silk Mills, located in New York.

Q. State what experience, if any, you had prior to your connection with the Champlain Silk Mills?

(Deposition of Theodose Bellinger.)

A. I was ten years in the cotton business. I was eight years with the Lawton Spinning Company, of Woonsocket, Rhode Island, spinners, and the prior two years with the William A. Slater Mills Corporation, spinners and weavers of cotton goods, located at Slatersville, Rhode Island, and one year's experience with a worsted weaving plant. I went with the Champlain Silk Mills twelve years ago, and have been with them ever since. [130]

Q. Assume, Mr. Bellinger, that a cargo of Number 1 and Number 2 Canton steam silk waste became thoroughly wet with salt water, due to the stranding of a vessel and the consequent flooding of the hold in which the silk waste was stowed, on August 1st, and assume that the waste was unloaded on the dock on August 12th, and that it was wet down by hose while on the dock, and assume that it had been loaded in the refrigerator-cars on the 13th and 14th, and had been forwarded to its destination, Providence, Rhode Island, for the American Silk Spinning Company, by passenger train, and that it had immediately been put into the factory process upon arrival, so that it would have been in a wet condition for from three weeks to four weeks, when it was put into the factory process, will you state what in your opinion the percentage of loss in manufacture would have been, disregarding the element of discoloration?

A. Between 8% and 10%.

Q. Would the element of discoloration at that

(Deposition of Theodose Bellinger.)

time, in August and September, 1918, have made any difference to a manufacturer of spun silk?

A. That would depend entirely upon the purpose for which the waste was to be used.

Q. If it is to be for Government use?

A. The color would have absolutely nothing to do with it.

Q. Was your factory engaged in making cartridge bag cloth for the Government?

A. It was; 85% of the production was going to the Government.

Q. Will you state whether or not that was the condition in production of other spun silk mills?

A. I believe that it was the same condition that prevailed at all the mills, because the orders were generally placed *pro rata* based on the number of spindles each spinner operated. If we [131] were operating 85% of our spindles we have a right to assume the other spinners were operating a like number of their equipment.

Q. Do I understand your testimony to be that if this steam silk waste was to be used for the manufacture of cartridge bag cloth for the Government, that discoloration would make no difference?

A. No difference whatever.

Q. Why not?

A. Simply because the Government did not specify anything in regard to color. In giving out the specifications on that class of yarn it was specified that a certain yardage should be delivered to the plant, and a certain breakage strength

(Deposition of Theodose Bellinger.)

should be in the yarn, but nothing was said as to what the color of the yarn should be.

Q. Is it a fact that it made no difference whether the cartridge bag cloth was white or brown?

A. No difference whatever, as far as I know. The question of color never was raised.

Q. Mr. Bellinger, are you familiar with the silk industry in China and Japan? A. I am.

Q. You have been there and observed it?

A. Yes, sir.

Q. Will you state what Number *L* Canton steam waste is, and how it is produced?

A. Number 1 Canton steam waste is the waste produced in the reeling of the Canton raw silk produced in the filature. Some is produced in the homes where they have hand weaving, but the greater portion is the by-product of the reeling industry of Canton and the neighborhood of Canton.

Q. Will you describe briefly how the raw silk is produced, and what is left and what the silk waste is? [132]

A. The first step naturally is the raising of the silk worm. That is accomplished by the Chinese raisers by making selections, after the cocoon is spun, of the best quality of cocoon that they can select from that season's production, and instead of baking the cocoons, which is the usual course of any cocoon intended for reeling purposes, they allow the cocoon to remain in the ordinary temperature,

(Deposition of Theodose Bellinger.)

which changes the worm into a butterfly. That butterfly works itself out of the cocoon, and they have means, at least—

Q. You are speaking of spinning the cocoons?

A. I am leading to the spinning of the cocoon itself. After the butterfly has emerged from the cocoon they are mated, a male and female, and after the usual connection has taken place the male butterfly is destroyed and the female butterfly is allowed to lay her eggs and they are usually on what are called egg papers, and usually under a small glass, probably an inch and a half in diameter. After the eggs have been laid the female butterfly is killed and examined under the microscope, to find out whether she was absolutely healthy, and if she was those egg papers are prepared and kept in a cool place until the season in which they are to be used, and usually they are sent out into the interior about the time the mulberry leaves are ready to be picked, for the spinning of the cocoon. After being exposed to the rising temperature five or six days the eggs hatch and become tiny worms. They proceed to eat the mulberry leaves, until the worm in about four weeks is completely matured and ready to spin the cocoon. The spinning of the cocoon requires from twenty-four to thirty-six hours, and the cocoons that are intended for reeling are immediately baked in order to kill the worm inside and prevent it from becoming a butterfly and

(Deposition of Theodose Bellinger.)

getting [133] away from the cocoon and making it unsuitable for reeling purposes. Those cocoons are sent to the filatures, where they are sorted out, and the good cocoons are given to the filatures, to the Chinese or Japanese who do the reeling, and are put into a basin in which there is boiling water, in order to dissolve the gum on the surface of the cocoon, and from the basin they are passed to another basin from which the reeling is done, and the girl that attends to the reeling has a small whisk-broom with which she keeps striking the cocoons so as to remove the surface and outside envelope in order to get it into condition for reeling purposes. Naturally she detaches a lot of fibres that stick to the whisk-broom and are discarded and is part of the waste used in the spun silk industry. In weaving the cocoon the outside surface contains the better silk, because that is spun by the worm when he is strong. When the worm gets down to the bottom of his work he gets weaker and the silk is weaker. After spinning a certain portion of the top surface it begins to break, and when the girl finds it breaks too often this portion of the cocoon is taken out of the basin and that also forms a part of the waste silk used in our industry. After this waste is made, in the best regulated mills it is usually cleaned. They take out the portion of the worm that is left in the partly spun cocoon, and this waste is washed, and at times passed through an extractor in order to take out the water remaining in the fibre, and dried in ovens or automatic driers.

(Deposition of Theodose Bellinger.)

In a less well regulated mill this waste is exposed to the weather. If it is a nice sunny day, it dries quickly; if it is in the rainy season, sometimes the drying process requires several days, and naturally the silk exposed to the weather is not as good as the silk dried under [134] the proper atmospheric conditions, and this is what determines the quality of the waste to some extent.

Q. Is the waste you described last—state whether or not that is Number 2?

A. As a general rule, waste exposed to the weather and dried under conditions such as I have described is classed as Number 2 waste, because it is darker in color, and that is because it is less desirable for manufacturing purposes than one which is treated properly after being made in the filature.

Q. As a rule, as I understand your testimony, Number 1 silk waste is dried artificially?

A. As a general rule, not always; in other words, if a waste is dried outside under proper conditions it will come out in as good a quality as one dried artificially, but of course it is a more risky proposition, especially in the Orient the weather is more or less uncertain.

Q. Then in the course of manufacture of this product it is wet? A. Yes.

Q. And requires drying? A. Yes.

Q. Will you state whether or not in your observations in the manufacture, there is ever any tendency to spontaneous combustion of the product?

A. No, I never did.

(Deposition of Theodose Bellinger.)

Cross-examination by Mr. KORTE.

Q. Then the grades Number 1 and Number 2 merely designate the particular kind of silk, that is, raw or waste silk, that is segregated, but do not mean that Number 1 has different ingredients from the ingredients of Number 2?

A. The only difference being, as a general rule Number 2 waste contains more animal matter, more worm than Number 2, because [135] a mill not equipped to-day for drying properly is usually a mill which does not produce as high a standard of goods as one which is, and consequently the waste is more neglected, doesn't receive the attention Number 1 would receive.

Q. Wouldn't Number 1 contain about as many waste cocoons?

A. Number 1 will not,—as we receive it does not because it receives a closer sorting.

Q. I have some here which I think was received from the Company, so there will be no dispute about the kind of waste silk we are experimenting. We have all got to experiment more or less. What would you say that sample is which I show you (handing a sample to witness)?

A. I would call that a good Number 1 Canton waste.

Q. Yes. Number 2 would contain more animal matter than Number 1, I have shown you.

A. Yes, and would be very much darker in color.

(Deposition of Theodose Bellinger.)

Q. The experiment you made was your visual observation of the temperature by means of a thermometer? A. That is all.

Q. Under the conditions under which you observed it, as I understand you had 15 pounds of waste? A. Yes.

Q. Contained in a gunny-sack?

A. No, we covered it up with sacking.

Q. It was laid on the floor? A. Yes.

Q. And covered up with the gunny-sack; you kept it saturated?

A. It was saturated when we first started the test with the solution I spoke of, and we allowed the waste to remain in a wet condition twenty-four hours. Then we allowed it to drain naturally, and set it on the floor covered with gunny-sacking, and weighted down to produce the same pressure under [136] which the waste is baled in Canton.

Q. How could you do that?

A. By putting the waste on top of the boarding and weights on top to press it down and produce practically the same effect as the bales put up in Canton.

Q. What pressure are they put under?

A. They are simply hand baled, are quite loosely put up.

Q. You don't know how these particular bales were put up?

A. They are all in the same way. I saw some bales myself.

Q. Which ones did you see, the ones which were

(Deposition of Theodose Bellinger.)

saturated? A. I saw some thoroughly wet.

Q. You saw the damaged ones? A. Yes.

Q. You didn't see any of the undamaged?

A. No.

Q. But the damaged had been turned apart and more or less rebaled as I understand it. And how did you make your observation in reference to the temperature; you took the temperature of a room like this?

A. Yes, we had a room a little larger than this with an ordinary thermometer.

Q. With the windows open? A. Yes.

Q. They had to live in it, had to have atmosphere?

A. Yes.

Q. You took the thermometer on the wall and observed the temperature of the room? A. Yes.

Q. How did you make your observations in reference to the temperature of the silk?

A. We took the thermometer and placed it on the silk. [137]

Q. In what way?

A. We took the thermometer and covered the end of the thermometer with the wet silk and let it stand there a few moments, and then had the temperature it showed.

Q. How did the wet silk act when you had it under the pressure, as you claim?

A. It showed absolutely no change whatever.

Q. Did it start to work at all,—ferment?

A. No, none whatever, because there is a certain odor that escapes from the material on account of

(Deposition of Theodose Bellinger.)

the animal matter you have in there.

Q. You didn't observe it producing any heat whatever? A. None whatever.

Q. You said it made no difference with reference to the discoloration if you are going to use it for Government purposes; for commercial purposes it made a difference? A. Yes.

Q. In what way?

A. Simply because,—I am talking from our own manufacturing standpoint,—we made a specialty of white silks and consequently discolored wastes are not produced by the mill our customers expected it from.

Q. Could you have used it for other things if you had the advantages of dyeing it different colors; would it have made any difference in discoloration?

A. It would if you were to dye the stock in delicate colors.

Q. In black? A. No.

Q. In tan it would have made no difference, you could have used it for that nicely?

A. Yes. [138]

Q. This discoloration was caused you said by the sea water coming in contact with the fiber?

A. Yes.

Q. It was saturated at sea. You said also that if it had been brought on in a wet condition you could have saved it all except 8% or 10%? A. Yes.

Q. To do that you would have to keep it in a wet condition, would you?

A. Personally, I wouldn't claim so, because I

(Deposition of Theodose Bellinger.)

claim even if the material had been allowed to dry partly on the way from the Coast to the mill it wouldn't have made any difference practically in the manufacturing for the purposes the silk is to be used.

Q. If it dried partly could you use the dry part; the outer surface would dry?

A. You could use it for the same purpose this waste was intended to be used.

Q. Even though dried?

A. Partly dried, because the first process it goes through in the manufacture it is to be wet again.

Q. The thought I had in mind was this: that it was saturated with salt water? A. Yes.

Q. Was in a wet condition? A. Yes.

Q. Now it was partly dried when it came on here?

A. Yes.

Q. Eventually you saw it? A. Yes.

Q. What was its condition then,—dry or wet? [139]

A. You could say it was very damp.

Q. Was that sufficiently moist so you could have gone to the mill and washed it out?

A. Yes, in fact there was a sample sent to us we did process.

Q. What was the effect on that sample?

A. It came out discolored.

Q. That was the only damage you found?

A. The fiber had been slightly weakened.

Q. Which it would be if exposed to salt water.

A. Yes, or any water if allowed to remain in that

(Deposition of Theodose Bellinger.)

condition. That is why I stated that disregarding the discoloration I would assume the damage would be between 8% and 10%.

Q. I didn't understand your answer, I catch it now, thank you. Of course as soon as it arrived here at the mills you would proceed immediately to wash it and get the animal matter out, and they dry it? A. Yes.

Q. And that is the way of preserving it?

A. Yes.

Q. Is that a very difficult job; is there any special machinery you need for that, or is it simply a wet wash proposition?

A. This is reeling. Where it is spun the manufacturing comes in, to be able to do it properly.

Q. It takes a man who understands the business?

A. Yes. I mean that is one difficult process of spun silk.

Q. I would like to know what process it goes through. Tell me the method you use, and what you do when you bring the raw silk to the factory, the first thing you do, what do you do with it?

A. After the raw silk is unloaded it is examined and compared with the sample from which it was purchased. If found to be up [140] to sample, —I am describing our system in the factory, every shipment is given a factory allotment and put in the warehouse. Every week there is a schedule in what we call the boiling department or degumming department, stating the number of boils, a batch of 100 pounds, are to be processed a given week.

(Deposition of Theodose Bellinger.)

Those batches of 100 pounds if they are intended for what we call the boiling process are given to a group of men we call baggers. They break up the silk into small pieces of about one-half pound and put this waste into a bag, a mesh bag, which is tied, and after the entire 100 pounds is put up it is passed on to the boiling and degumming department. There we have large vats with between 200 and 250 gallons of water put in and a certain percentage of soap and a certain percentage of alkali, and it is brought to the boiling point.

Q. What would that boiling point be?

A. It is 212, and then this material put into the small bags is put into the vat and degummed a certain period of time.

Q. What temperature must you maintain in the boiling process; do you have to watch that at all?

A. Yes, if it is a boiling process it has to be kept at the boiling point all the time if we want to have the regular results in the boiling. There is another process called maceration. This is not a boiling process, it is simply a process which degums the waste by a slower process,—Maceration, simply lukewarm water, with a certain amount of chemicals, some chemicals, others soap, and accomplishes the same results as in boiling.

Q. In boiling you retain it at the boiling point, and don't let it go beyond the boiling point?

A. Once it is kept boiling within the period of time determined for that class of waste we get usually the results we are after. [141]

(Deposition of Theodose Bellinger.)

Q. Does it depend on the kind of water, whether it is soft or hard water?

A. All well organized mills use nothing but pure soft water. It is usually softened by artificial means.

Q. Then the original treatment of the waste silk is boiling the gummy or animal matter out?

A. That is right.

Q. And naturally getting the fiber of the waste free from animal matter you can dry it and spin it?

A. That is right.

Q. I asked you whether or not you could use silk by dyeing it to darker colors. Of course the percentage then of damage would be the same as you put it, barring the discoloration, would it not?

A. Yes. The only point is that the market for such colored silk is very limited, as far as the spun silk industry is concerned.

Q. I assume the greatest demand is for white material and from that they make it up into all the different colors? A. Yes.

Q. The discoloration you found by reason of the salt water, was it so set that it could not have been bleached,—or do you bleach silk fiber the same as cotton and wool?

A. It receives a bleaching process while being degummed, but our experience has always been that silk or waste which has been wet and allowed to remain in a wet condition will not bleach out to the extent that waste that is not damaged before the degumming process.

(Deposition of Theodose Bellinger.)

Q. So in dealing with raw waste silk any such silk that has been saturated with any kind of water depreciates of course in market value immediately?

A. If it is allowed to remain in a wet condition, yes.

Q. What length of time, Mr. Bellinger, must you confine the [142] boiling process; can you leave it in a longer or shorter time; is there any definite time you must boil it in order to be successful?

A. Certainly, well, this is a question that I don't know—this is usually a secret of the trade.

Q. I don't want you to give away any secrets only in a commonplace way?

A. A certain waste should receive a boiling process,—We have a first and second process in the boiling. As far as the first boiling process is concerned the waste is allowed to remain in the liquor 25 or 30 minutes. Naturally you will get a certain irregularity in the fiber, which will cause you manufacturing trouble afterwards.

Q. You aim at getting a uniform fiber?

A. We aim at getting a uniform fiber and we go so far as to make a sample of each manufacturing lot in the degumming in order to be sure the degumming will be done properly in the entire lot.

Q. I think you spoke of having had experience with raw waste silk being saturated with salt water in the past? A. Yes.

Q. What did you do with it—were you able to accomplish anything in saving it?

A. What we showed was in our own particular

(Deposition of Theodose Bellinger.)

case, as soon as shipment is received in that condition we notify the transportation company and have them send a representative to our mills and examine the waste in the presence of one of our representatives and agree on the percentage of the bale which has been damaged and arrive at a certain claim. Those claims are usually put in with the transportation company with the understanding they will give us a decision promptly, so we can process the waste and save as much of it as we can. [143]

Q. I mean not so much the trying to get the claim out of the railroad, but what you do with it by way of salvaging it and working it up?

A. We simply process it, and if it is waste that has been discolored to any great extent we make a claim and keep the stock separate and use it in a very small proportion of the mixtures, so as not to interfere with the ultimate quality of the goods.

Q. So in this particular instance if it could have been worked into powder bags for the government there wouldn't have been any damage at all by reason of the discoloration?

A. Not by reason of the discoloration.

Q. Aside from that was there any damage?

A. Yes, I would say 8% to 10%.

Q. I mean to the silk after it came out of the salt water in the vessel. A. Yes.

Q. And of course was there on the docks and then afterwards was taken over to Seattle and dried. Now, between the time it was in the salt

(Deposition of Theodose Bellinger.)

water and on the docks, and so forth, aside from its discoloration— A. Yes.

Q. No,—strike that out,—if it could have been worked up and washed and worked into cartridge bags there wouldn't have been any loss?

A. Six months after it was wet?

Q. Assume that it laid in salt water for some 14 or 16 days, and you then started to treat it at the mills, could the cargo have been wholly saved by the process you ordinarily go through, that it would come to the mills for manufacture?

A. All but, I should say, 10%, aside from the discoloration. [144]

Q. What is that 10%?

A. That 10% would be for the weakened fiber, the simple fact that the fiber had been allowed to remain wet that length of time. If the shipment had been received by us in a wet condition we wouldn't have attempted to make 100% yarn out of that material. We would have blended it with something else in order to reduce the danger in manufacturing as much as possible.

Q. You saw the silk when it came on? A. Yes.

Q. After they had tried to dry it to get it in shape so they could move—it was such that it was useless then?

A. I considered the entire shipment worth $10,000. That was the offer I made on it.

Q. What did you think damaged it; what was the matter with it, that you allowed so little value?

A. Because it was very much discolored, and the

(Deposition of Theodose Bellinger.)

fiber had been weakened very much.

Q. Assuming you could have used discolored silk in your factory, make use of it in the garments or whatever you would manufacture for the Government, barring the discoloration, that you could have used it, what would you say it was valued at, aside from the weakening of the fiber, which of course is the definite inherent damage?

(Question read by the stenographer.)

Mr. KORTE.—I want to know if there is any difference in the damage before it was sent on than it was before they attempted to dry it as Seattle.

A. If there was any difference in the damage when it was wet at the Coast?

Q. And when it arrived here?

A. Very much different. [145]

Q. What was the difference?

A. Because of the mere fact it had been allowed to remain in a wet condition, dried out at the Coast, —it wasn't dried out—because the sample we had submitted to us was still in a damp condition, and the small samples we put through at the mill at the time showed the fiber had been very much weakened on account of having remained in a wet condition so long.

Q. Then the fiber was weakened by the fact it lay saturated in the salt water so long?

A. Naturally that had some bearing on it, and also the fact it had been partly dried and kept in that condition for that length of time.

Q. You would not offer very much for a cargo

(Deposition of Theodose Bellinger.)

of silk that had been in salt water say 15 or 20 days would you, barring discoloration,—you couldn't use the discolored part?

A. I would offer 90% of the value to use it for the purpose we were using waste at the time. Under present conditions, from our own manufacturing standpoint, probably 50% of its value.

Mr. LYETH.—That is, you are considering the discoloration?

Mr. KORTE.—Considering discoloration; you can't use discolored fiber.

The WITNESS.—Yes.

Q. You would have to dye it in dark colors, and you say you don't do that?

A. It is very uncertain business.

Q. What seems to be uncertain about the heavier colors?

A. Wet colored silk the spun silk spinners seldom use, it goes to the woolen and worsted manufacturers for decoration in the fabrics, and of course change of style from one season to [146] another, you sell to-day all violets and six months from now perhaps nothing but gray. It is a very uncertain class of trade.

Redirect Examination by Mr. LYETH.

Q. You spoke about drying out and remaining in a dried out condition, causing a weakness of fibre; will you explain that?

A. Yes, we find that waste silk which is wet and allowed to dry in the natural process of drying will be more discolored and much more difficult to

(Deposition of Theodose Bellinger.)

process afterwards than a waste which is treated after being wet and not having been allowed to dry out.

Q. As I understood, you testified on cross-examination that you saw samples of this particular cargo of silk waste?

A. Yes, we had some samples sent to Whitehall, and I saw the waste. Afterwards I was present at the auction you held in New York, and saw the goods in the warehouse.

Q. And you know the condition? A. Yes.

Q. That was at the auctioneers, Burling & Dole?

A. Yes.

Q. Will you describe the condition of the silk waste you saw?

A. The samples on exhibition there in the basement of the building were still, some of them quite damp. The stock was very dark in color, and in our estimation had been very much weakened. Some of it was discharging a very bad odor the morning we saw it there.

Q. How long does the process of degumming by fermentation that you spoke of take, without boiling?

A. There are two distinct processes. One takes twenty-five or thirty minutes; the other one takes from seven to eight days.

Q. Do I understand your testimony that this silk having been allowed [147] to dry naturally caused the weakening of the fibre?

A. I beg your pardon?

(Deposition of Theodose Bellinger.)

Q. Do I understand your testimony to be that the allowing this silk out of the "Canada Maru" to dry by natural means, and the length of time that it had been drying, caused the weakness of the fibre? A. Yes.

Q. Referring to my hypothetical question,—you remember— A. Yes.

Q. The silk had come forward? A. Yes.

Q. What difference would it have made in the manufacturing process of the silk, assuming that it had been wet the same length of time, due to the presence of salt water as distinguished from fresh water?

A. It would have required either an additional process of boiling or a much longer original process of boiling.

Q. Why?

A. Because the wetting of the silk seems to have a certain action on the fibre, which requires a much longer treatment in the degumming or maceration process.

Q. You would have had to remove the salt before you put the soap in?

A. No, we wouldn't; we would have treated it the ordinary way, only we would have increased the period of boiling; that is where the danger comes of weakening the fibre further on account of keeping the material under treatment a longer period of time than is usual when the silk is in proper condition.

Q. Did you consider that extended treatment in

(Deposition of Theodose Bellinger.)
the manufacturing process in your estimate of 8% to 10% damage? A. Yes.

Q. Are the bales of Canton steam silk waste that you have observed of uniform pressure?

A. Yes, they are. [148]

Q. How are they packed?

A. There are three distinct parcels which are tied together, in what they call the go-downs in Canton, and those three parcels are combined and tied usually with a piece of rattan and covered over with straw matting, and those bales are all put up in uniform weight in what we call picol bales of 133 pounds. They make an allowance of 5% on the original weight, due to the loss of weight in transit, on account of the moisture drying out in the transportation between Canton and America.

Q. They are tightly baled, are they not?

A. The Canton bales are not; they are quite loose.

Deposition of Charles E. Burling, for Plaintiff.

And to further prove the issue on the plaintiff's part, the deposition of CHARLES E. BURLING was introduced and read in evidence as follows:
(By Mr. LYETH.)

Q. Mr. Burling, what is your occupation?

A. Auctioneer.

Q. Did you in March, 1919, sell a certain consignment of damaged silk waste in New York?

A. We did.

Q. Approximately how much?

A. Seven carloads.

(Deposition of Charles E. Burling.)

Q. And how many pounds?

A. 112,000 pounds—to be accurate, 112,101.

Q. Was this silk waste out of the steamer "Canada Maru"? A. I couldn't say.

Mr. KORTE.—It is conceded that the silk waste which was handled by Mr. Burling was the silk waste contained [149] in the following cars: N. & W. 635461, P. R. R. 515193, C. & O. 8130, N. Y. C. 258539, B. & O. 96161, R. I. & G. 151247, L. V. 34995, being the silk waste involved in this suit.

Q. Will you state, Mr. Burling, what you did with respect to arrangements for the sale, advertising, etc.?

A. Upon instructions to sell these seven carloads we proceeded to accept the delivery of one carload at the stores 599–601 Broadway. The remaining six carloads were left at the Harlem River to be examined by prospective purchasers upon presentation of Burling & Dole's order to the Superintendent of the yards. We advertised the raw silk in the Journal of Commerce.

Q. Did you advertise the sale of the raw silk?

A. The auction sale of the raw silk which was to take place on Wednesday, March 19th, 11 o'clock at 599 Broadway was advertised in the following papers: "Journal of Commerce," 17th, 18th and 19th of March; "Daily News Record," the same dates and "New York World," March 19th. We caused to be printed a circular descriptive of the seven carloads which we sent to the trades inter-

(Deposition of Charles E. Burling.)

ested within a radius of 250 miles. 500 of these circulars were sent out. We had numerous prospective buyers call, but not many required the permit to examine the car lots after viewing the one car which had been subdivided into three lots. The sale took place as advertised and the ten lots were purchased by four different buyers, Rudolph Cohen of New York, General Silk Trading Company of New York, A. Brauer & Brother, Paterson—they did have a New York office, I don't think they have now—and A. J. R——. I would have to get the rest of that name for you. There were possibly 25 to 35 people in attendance when the sale was held. The buyers were silk merchants, either jobbers or manufacturers. [150] The gross proceeds of the sale amounted to $16,628.42, less charges as follows: Commission, $831.42; cataloguing, advertising, circulars, postage and insurance—insurance for what we had in our store—$124.71; labor and weighing—for the lot that was in the store we had a weigher come—$91.55; freight and cartage paid $681.93; port warden's fees, being held for a decision as to the legality of the charge, $83.14—making a total charge of $1812.75—net proceeds of the sale $14,-815.67.

Cross-examination by Mr. KORTE.

Q. What was the physical condition of the silk?

A. In very bad shape, wet and tangled—it was assumed that there were 867 bales, but no mortal man could tell whether there were 8000 or 800—I will

(Deposition of Charles E. Burling.)

modify that, no mortal man could possibly tell how many there were.

Q. The bales were broken, were they?

A. All broken, the worst, almost, I ever saw; we had to get some outside help, our men would not handle it, absolutely refused because of the odor and the difficulty. The condition was so bad that it would take 2, 3 or 4 men 15 minutes to half an hour to unwind a long skein, pull it out, otherwise you would have to cut it; it was so badly tangled they had great difficulty in handling it and then the odor drove away most of the buyers as well as the laborers.

Q. Were they in boxcars or open cars?

A. Boxcars.

Q. Can you detail how much you sold each one of the buyers?

A. R. C.—that's Rudolph Cohen—purchased lot 1 at 13 cents per pound, amounting to $339.56 and lot 5 at 17½ cents a pound for $2358.47, total $2698.03. General Silk Company purchased lot 2 at 12 cents, $571.32 and lot 9 at 12½ cents, [151] $1399.37, total $1970.69. A. Brauer & Brother purchased lot 3 at 11 cents, $852.50 and lot 4 at 22 cents, $2424.40, also lot 7 at 15 cents a pound, $2660.25, and lot 8 at 12½ cents a pound, $2550.50, total $8487.65, and A. J. R. bought one lot, lot 6 at 15 cents, $3472.05.

(By Mr. LYETH.)

Q. This sale was actually held at your auction

(Deposition of Charles E. Burling.)

rooms? A. At our auction rooms.

Q. Where is that? A. 599 Broadway.

Q. And the firm that you mention, Burling & Dole, is your firm of auctioneers?

A. Yes, I am the senior member of that firm.

Mr. LYETH.—And I want to introduce a sample of the stuff in its sound condition. This is the No. 1 silk waste. That is, in the condition before it was submerged in the water.

The COURT.—How large were the bales?

Mr. LYETH.—133 pounds per bale. They were hand-compressed and wrapped with matting.

Mr. KORTE.—They would be about the size of a hay bale, your Honor.

The COURT.—And in order to dry it they had to take it out of this bale and spread it on supports of some kind?

Mr. LYETH.—Yes, spread it out and have the wind dry it.

And thereupon the plaintiff introduced samples of silk waste, which were received in evidence and marked respectively "Plaintiff's Exhibit No. 6–A"; "Plaintiff's Exhibit No. 7–A"; "Plaintiff's Exhibit No. 10"; "Plaintiff's Exhibit No. 11"; "Plaintiff's Exhibit No. 12"; "Plaintiff's Exhibit No. 13"; "Plaintiff's Exhibits Nos. 14, 15 and 16"; "Plaintiff's Exhibit No. 17"— [152] all of which are transmitted to the Circuit Court of Appeals with all of the original exhibits in the case.

Deposition of Fred Pearson, for Plaintiff.

And thereupon, to further prove the issue on the plaintiff's part, the deposition of FRED PEARSON was introduced and read in evidence as follows:

Direct Examination by Mr. LYETH.

1 Q. Mr. Pearson, what is your occupation now?

A. Foreman silk-dresser.

2 Q. How long have you been employed in that capacity? A. Since 1875.

3. Q. How long have you been with the American Silk Spinning Company?

A. Going on five years; little over four years.

4 Q. And you have been silk-dresser since 1875?

A. Well, in that period of time I have had five years in the machine-shop. Outside of that, yes. That is all.

5 Q. Did you do that work in England as well as in this country?

A. Yes, sir. I was with Ormorod Brothers in England from 1875 to 1892.

6 Q. During this time, Mr. Pearson, have you handled silk waste, Canton steam silk waste?

A. More or less, yes.

7 Q. Will you state, Mr. Pearson, whether Canton steam waste which has been wet with salt water or fresh water can ignite by spontaneous combustion? A. I should say no, it cannot.

8 Q. Have you handled Canton steam waste which has been wet?

A. Yes, time and time again, from floods.

(Deposition of Fred Pearson.)

9 Q. And has that ever charred or ignited?

A. It has never charred, not to my experience, only by overheating [153] in the fan in drying.

10 Q. And what happens then?

A. Well, of course, there is always men around then. It is always taken right out right off, might be only just one piece right over the fan where the heat comes and it might have stayed too long from the negligence of the management or the drier, it might have stayed too long in one place.

11 Q. Was it heat from the friction of the fan?

A. Heat from the fan, yes. Overheating of the fan. That is the only time I have ever known it to ignite.

12 Q. Can you burn steam waste, silk waste?

A. Well, it wouldn't burn. It just charred, blackened and charred.

13 Q. That is, if you put fire to it?

A. Yes, it would just blacken and char. Of course it will take the life out of it, you know; it will take the life out of the waste.

14 Q. If you burn it, if you char it?

A. Yes. We have waste that comes off of the gasoline upstairs and have to put kerosene on it to burn it, have to pour oil on it.

15 Q. You have tried to burn it without putting oil on it?

A. Yes, with the cleaning, the gasoline. After it has all been dressed and spun and then it passes through the gasoline, they have to do that. The dirt that is scraped off in the cleaning and out in

(Deposition of Fred Pearson.)

a pan in the gasoline room, that is taken down about every two weeks and taken into the yard and before they can burn it they have to pour kerosene oil on it and burn it right away. That is after it has passed through and been made into yarn. [154]

Cross-examination by Mr. KORTE.

16 Q. In what way would the heating of it affect the fiber, Mr. Pearson? You spoke something about the fiber being affected. Of course it heats and it macerates.

A. If it don't get overheated it wouldn't affect the fiber at all, if it only gets the ordinary drying. But if the man, as I say, gets the fan too hot.

17 Q. What is this fan? Is it to produce heat or is it a cooling process?

A. No. It is a drying process, to dry the waste after it has been washed. You are speaking of waste with the gum in?

18 Q. Yes. You have seen it in heaps like a manure pile, have you not? You have seen it heat and keep on heating?

A. No, it will get to about one certain amount and no more.

19 Q. And then dies down?

A. And then dies down, as the animal matter dies, then the heat will die.

20 Q. Now did you ever see it affect the fiber by that process? A. No, sir.

21 Q. You haven't?

A. Not to my knowledge. Of course, the fiber, after it has been wet, after the waste has been wet,

(Deposition of Fred Pearson.)

and then you take and boil it off, will be stained and discolored and the percentage then is not quite so good.

22 Q. Why?

A. Because it has—to a certain amount it has been macerated, the silk has been macerated to a certain amount, and some parts of it has and some parts of it hasn't. Then you have to take that and boil it a certain amount of time, because if you were to separate one part of it from the other and boil this so much less because this has macerated only such an amount and the other not at all,—you have to boil it [155] the same basis as if it had never been wet.

23 Q. How would that effect it?

A. You would lose in the dressing. The man that got that silk would lose money by it.

24 Q. Uneven maceration?

A. Uneven maceration, and—well, you could say it was damaged.

25 Q. How long, ordinarily, would it take to produce that condition? Say, for instance, waste silk has started to macerate, how many days thereafter would you get an uneven maceration?

A. It depends whether you are going to macerate some all the way through or not. If silk gets wet, as soon as ever it gets wet the maceration starts right in.

26 Q. The original process was maceration, was it not? That was the method by which they degummed the silk originally, it was maceration?

(Deposition of Fred Pearson.)

A. Yes. Some use four days, some use fourteen days. There is lots of people vary. Of course there is a certain class of silk that carries a heavier gum than others. It depends on the class of silk, how much you are going to degum.

27 Q. How much would you say you should allow Canton China to macerate?

A. Some use about eight days for that.

28 Q. Suppose it macerated longer than that, how would that effect the fiber?

A. Well, I think it would rot.

29 Q. It would rot the fiber? A. Yes.

30 Q. It would weaken it at least, would it not?

A. Yes, it would rot.

Redirect Examination by Mr. LYETH.

31 Q. If you kept the silk wet down, which had started to macerate, would that retard the maceration process? [156] A. If you kept it wet?

32 Q. Yes.

A. Always keep it wet while they are macerating. It is always kept wet while it is under maceration with a certain amount of steam, heat,—a certain amount of heat.

33 Q. I mean if they put water on it.

A. You keep it in water. It is submerged in water in the maceration.

34 Q. The original method of maceration, as I understand you to say, you keep the silk submerged in water? A. Yes.

35 Q. Well, now, if the silk were only damp and

(Deposition of Fred Pearson.)

left to dry naturally, would that accelerate the weakening of the fiber?

A. Oh, yes, it would weaken the fiber and, more than that, it would be stained, it would be badly stained, the silk would be badly stained.

Recross-examination by Mr. KORTE.

36 Q. In what way would the staining affect the fiber, Mr. Pearson?

A. Some would be red, yellow, and like that.

37 Q. I mean the fiber itself, its tensile strength.

A. Oh, it would weaken it.

38 Q. It would weaken it, the discoloration?

A. Yes, where it is discolored that wouldn't be as strong as the original.

Redirect Examination by Mr. LYETH.

39 Q. Have you ever tested out the strength of silk that has been discolored?

A. Well, not to put any particular test, but as experience teaches us right away what is the matter with the silk when we get it here. [157]

40 Q. Does the silk which has been wet, the silk waste which has been wet, heat as much as a manure pile, for instance?

A. Well, not quite. After a certain period of time the heat will go down.

41 Q. Where the silk is charred, as you spoke of, in the drying of it does that come from heat, external heat? That isn't produced by the silk itself?

A. No, that isn't produced by the silk itself.

(Deposition of Fred Pearson.)

42 Q. It is the heat from the fan?

A. It is the heat from the fan. That is from the negligence of the operator.

43 Q. Let the fan get too hot and the silk near it got very hot? A. Yes.

Deposition of Samuel H. Pearson, for Plaintiff.

And thereupon, to further prove the issue on the plaintiff's part, the deposition of SAMUEL H. PEARSON was introduced and read in evidence as follows:

1 Q. What is your occupation?

A. Superintendent silk spinning.

2 Q. In this factory, American Silk Spinning Company? A. Yes.

3 Q. How long have you held that position?

A. Seven years.

4 Q. How long have you been in the silk business, manufacturing of silk spun yarn?

A. Forty-two years.

5 Q. In this country?

A. No. Thirty-three years in this country.

6 Q. And the rest of the time?

A. In England. [158]

7 Q. Have you during that time handled Canton silk waste?

A. Yes, both before I came here and ever since.

8 Q. You have handled it all during your experience in the silk business? A. Yes, sir.

9 Q. How old are you, Mr. Pearson? A. 54.

10 Q. Have you had any experience with Canton

(Deposition of Samuel H. Pearson.)

steam waste which has been wet by salt water or fresh water? A. Yes.

11 Q. Many times? A. No, not many times.

12 Q. Will you state whether or not in your opinion Canton steam waste which has been wet can ignite by spontaneous combustion?

A. Not to my knowledge.

13 Q. Have you ever heard of it igniting?

A. No.

14 Q. —from spontaneous combustion, because it has been wet? A. No.

15 Q. Can you burn it?

A. Well, you can if you put kerosene oil or something else on, but I don't know that you could burn it without,—how you could. I don't think it can be burned unless it was a terrible fire or something like that. If the mill was on fire, why, it would be scorched, but to set fire to it I don't think you could do it unless there was something put to it to help it to burn.

16 Q. How does it act when it is wet?

A. Macerates, decomposes if it is left long enough.

17 Q. Decomposes the fiber?

A. Yes, rots it. [159]

Cross-examination by Mr. KORTE.

18 Q. How long would you have to allow it to macerate in order to rot the fiber?

A. Well, that would depend, I should think, a great deal in whereabouts it was, where it was.

(Deposition of Samuel H. Pearson.)

19 Q. Well, we will say it was submerged in water just like you would macerate in order to degum the original waste; how long would you have to leave it in water in order to rot the fiber?

A. Well, if it was left in water all the time, I don't know—I think that would take quite a long time to do that, to rot, you know. But if it was wet and then taken out and let the air strike it, that is when it begins to rot, you know.

20 Q. How soon after it comes out of the water?

A. I should think in a week's time it would begin and then it would go fast then, you know. You see after it once started it would go very fast.

21 Q. It would affect the fiber? A. Yes, sir.

22 Q. Now, if you had it saturated in water and then took it out in the air, it would start to heat, would it not, considerably?

A. Why, it would heat a little but never stay there. If it was taken out in the air and spread and left to dry and dry quickly, I don't think it would do any damage at all. I don't think so, unless it had been discolored.

23 Q. The salt water would discolor—saturated completely in salt water it would discolor?

A. That would discolor it and that would affect it.

24 Q. The discoloration affects the fiber itself?

A. Yes, sir.

25 Q. What per cent would you say the discoloration would affect the fiber, what percentage?

(Deposition of Samuel H. Pearson.)

A. That would depend a great deal on how long it had been in. [160]

26 Q. Say it had been in salt water ten days and then taken out in the air and opened up?

A. I wouldn't like to commit myself on that.

27 Q. Oh, just make a guess on that, give your best opinion, that is all I want.

A. Well, a great deal—I couldn't tell.

28 Q. Fifty per cent?

A. Yes, I should say so.

29 Q. 75 would it not?

A. Well, I would say fifty per cent at least.

Testimony of Charles B. Wheeldon, for Plaintiff.

And, to further prove the issue upon the part of the plaintiff, CHARLES B. WHEELDON was called as a witness, sworn, and gave the following testimony:

Q. (Mr. LYETH.) Captain Wheeldon, what is your occupation?

A. I am employed by the owners and underwriters to represent their interest in hulls and cargoes reported in distress, the object being to consult with the master and to minimize the expenses and get the vessel and cargo to destination as promptly as possible.

Q. Are you what they call a marine surveyor?

A. I suppose I would have that title. It is hard to give me any title. I do not know what I am myself. That is my work.

Q. When a vessel is in distress you go to the

(Testimony of Charles B. Wheeldon.)

port and endeavor to get the damaged cargo forward?

A. That is my mission, and when she is on shore to get her to port and then to get her cargo to destination.

Q. How long have you been engaged in that occupation? A. Twenty-five years. [161]

Q. What were you doing before that?

A. Master mariner.

Q. At sea? A. At sea.

Q. For how long? A. Twenty years.

Q Have you had experience, Captain Wheeldon, with various kinds of cargoes that have been wet in wrecks?

A. Yes; that has naturally been my work. A vessel that is in trouble the cargo as a rule is wet, either on fire or stranded.

Q. What sort of cargoes have you had experience with?

A. Various cargoes; wheat, cotton, wool, general merchandise.

Q. How many such cargoes have you dealt with; roughly give us some idea of what experience you have had?

A. I don't know. I suppose I have been to 150 ships. I cannot recall that. I haven't any record of the number.

Q. Did you have anything to do with the cargo on the "Canada Maru" in August, 1918?

A. I did.

Q. What did you do?

(Testimony of Charles B. Wheeldon.)

A. I came from New York representing parties—

Q. (Interposing.) Your home is in New York?

A. Yes—representing parties that had the insurance of $1,400,000.00 on the "Canada Maru," consisting of silk, matting, wool, tobacco, and various other commodities.

Q. They were not principally interested in the cargo of silk waste that is the subject of this suit?

A. I don't think so. I don't know about that. I think that interest was represented out here by Mr. Taylor. My only interest there was that I was asked to consult with Mr. Taylor when I arrived and if I could be of any benefit to him to advise and consult with him. I did not have that direct, [162]

Q. Did you or your principals consult with the various manufacturers of silk, with reference to the best method of handling the damaged silk which you expected would be on the "Canada Maru"?

Mr. KORTE.—I object to that unless he had personal knowledge of the subject.

A. Well, the only knowledge I have is the result of their inquiries that was given to me—the result of their inquiries from their consignees.

Q. What were your instructions?

A. The instructions were that the opinion of the consignees were—

Mr. KORTE.—I object to that as hearsay.

The COURT.—What were you told?

A. My instructions were to have the silk loaded

(Testimony of Charles B. Wheeldon.)

in refrigerator-cars and rushed East by the fastest train we could get. At that time it was supposed that the "Canada Maru's" holds had been submerged. The reports were very discouraging; being that one of the holds—No. 1 hold was full of water and No. 2 and No. 3 were filling, and we imagined that the shipment of silk were submerged, and it was in view of that that those instructions were given me. I might add that in a former case instructions were given under the same circumstances, on the "City of Rio de Janeiro," in the entrance to San Francisco harbor.

Q. And the conditions were the same?

A. The cargo was silk, and the instructions were to rush it through in refrigerator-cars.

Q. Why was it to be put in refrigerator-cars?

A. My idea of it was that that was to prevent the silk from heating further and spoiling the fiber or staple.

Q. Or was it the idea to keep it wet? [163]

A. The idea was to keep it wet and as cool as possible.

Q. Was any of your cargo damaged, the cargo which you represented?

A. I think 19 bales of silk waste. I have a notation—I notice there it is marked as wet and stained.

Q. Was any of the raw silk—

A. Very few bales of that were marked stained.

Q. So that you had no real difficulty with your silk? A. Not a bit.

(Testimony of Charles B. Wheeldon.)

Q. Did any of the other cargo which you represented—

A. (Interposing.) We had two hundred bales of wool; twenty-seven were jettisoned and 183 remained. That wool had been thoroughly submerged.

Q. Was that unloaded from the steamer?

A. That was unloaded from the steamer.

Q. Did that heat?

A. That heated. In fact, I might add, from my experience I have not seen any commodity that does not heat—when it gets wet it heats.

Q. They all heat? A. They all heat.

Q. Is there any danger of spontaneous combustion?

A. I have not seen it and I would like to have somebody advise me what the danger from spontaneous combustion is.

Mr. KORTE.—We will do that for you, Captain.

A. (Continuing.) I haven't found any commodity yet, and I have shipped a great many commodities and different ones, and I never yet had any trouble from spontaneous combustion.

Q. Have you shipped cotton?

A. In many bales.

Q In railroad cars?

A. In railroad cars. [164]

Q. In the holds of steamers?

A. In the holds of steamers.

Q. And on deck? A. And on deck.

(Testimony of Charles B. Wheeldon.)

Q. Did you see the silk waste that is the subject of this suit? A. I did.

Q. When did you see it?

A. I don't know whether some was taken out—I was up there on the 7th when she arrived, and then she was pulling away from the dock, from the pier and went over to the drydock. I was up there again on the 9th, I think—I don't know whether a little was taken out then or not. I think it was the 12th, possibly, that there was a quantity on the dock.

Q. And you saw it then? A. I saw it then.

Q. What condition was it in—will you describe it?

A. It was thoroughly saturated, just as it was taken out of the hold, covered with beans and mustard seed and rice—not covered, but it was mixed with it, of course; it laid between two sheds; I don't know the numbers of the sheds, but it laid in the opening between the two sheds.

Q. Did you go down there with Mr. Taylor?

A. I did.

Q. When you arrived did you discuss with Mr. Taylor the best method of handling this silk waste?

A. I did. I suggested the method that had been suggested to me.

Q. Which was—

A. Which was refrigerator-cars and to keep it wet.

Q. And silk train service?

A. And silk train service.

(Testimony of Charles B. Wheeldon.)

Q. Did you accompany Mr. Taylor to the dock at Tacoma? A. I did. [165]

Q. Was that on the 12th?

A. Well, I don't remember the date. I know it happened sometime between the 7th when I was up there — I went up there with him the first time when she came back from the drydock.

Q. Were you present when he had a talk with Mr. Cheney?

A. I don't know who Mr. Cheney is, but I went with him to some office and talked with some officer. I would not know him if I would met him to-day.

Q. You heard the talk?

A. I heard him talk to some official regarding the refrigerator-cars.

Q. And what did you hear as to any arrangements made?

A. The understanding was that they were to furnish refrigerator-cars and ice them.

Q. And silk train service?

A. And silk train service. My impression is that the idea was that they were to go through with the other silk train.

Q. There was a silk train?

A. There was a silk train made up.

Q. That went forward, do you remember what time?

A. I cannot tell you that. I should say somewhere between the 15th and 20th. I left on the 20th.

Q. And that was made up of the raw silk that

(Testimony of Charles B. Wheeldon.)

was on the "Canada Maru"? A. Yes.

Q. Did you see the silk? Did you examine the silk at that time? A. I did.

Q. What was it condition? A. It was warm.

Q Did you see it after that?

A. I saw it when it was loaded in the car, some of it.

Q. Were you down there?

A. I was down there every day, practically. [166]

Q. When you saw it after the 12th, had they washed off the beans?

A. Yes; they had been playing water and washing it nearly every day.

Q. What was the condition with respect to heating?

A. It was still warm. I might add that I did not notice any particular heat there, because it was so slight compared with cotton and other things that was shipped, so that it didn't enter my mind that there was an unusual degree of heat.

Q. Did you see them load it in the refrigerator-cars? A. Yes.

Q. Did you go in the cars? A. I did.

Q. Did you feel the bales in the cars? A. Yes.

Q. What was the condition?

A. Well, it is my opinion that there was less heat there than there was outside. That might be due to the fact that it was out of the sun. That is what I attribute it to—that it laid between those two sheds and it was very warm, and when we got

(Testimony of Charles B. Wheeldon.)

in the car it felt to me cooler than outside.

Q. It was pretty hot outside in the sun?

A. It seemed to me so, between those two sheds, but I don't know the temperature.

Q. Did you feel into the bales?

A. I did, when it was on the dock, but not after it was in the car.

Q. How far in did you get?

A. I put my hand in on a bale that was broken up there.

Q. How far?

A. Perhaps six or eight inches.

Q. Did you notice any undue heat?

A. Not in my opinion.

Q. Was it hot? A. It was hot, warm. [167]

Q. How does it compare with a bale of cotton wet?

A. You would not keep your hand on a bale of cotton that was wet; you would take it off very quickly, nor would you in a car of grain that was wet. You would not put your hand in there and keep it there.

Q. How many bales of wet cotton have you handled?

A. I suppose a hundred thousand, easily enough. I mean by handling—I mean by that that we have shipped them.

Q. What did you do with your wool?

A. Shipped it to San Francisco.

Q. On the "Canada Maru"?

A. Shipped it to San Francisco.

(Testimony of Charles B. Wheeldon.)

Q. Did anybody raise any question about spontaneous combustion? A. Not the least.

Q. Was it wet? A. It was wet.

Q. Was it heating? A. It was warm.

Q. How was it, compared with the silk waste.

A. I didn't notice any heat there that gave me any concern; any more than I did on the silk waste.

Q. Was it more or less than the silk waste?

A. I think about the same. I felt a little bit uneasy about the wool, because that was wool in grease and I didn't know whether it was going to—

Q. (Interposing.) You took a chance?

A. That went all right, and not even the railroad raised any question.

Q. Did you ever have the railroads raise any question? A. Never.

Q. (Continuing.) About wet cargoes?

A. Never. [168]

Q. Or spontaneous combustion? A. Never.

Q. Did you ever have any question raised about wet cotton going forward?

A. Well, I had questions raised from the masters of the ships who didn't know. After it was explained to them they withdrew that objection. I never had any refuse finally to take it.

Q. You had captains raise the question whether the cotton would take fire?

A. They seemed to have that idea, that because it is wet it must take fire, because it is warm it must take fire.

(Testimony of Charles B. Wheeldon.)

Q. Why didn't you have that condition in the past?

A. Well, we have what is issued as Lloyd's Almanac, which many of the British ships swear by, and in that there is a little note that tests and experience for years have shown that wet cotton will not take fire. After that is read to them they seem easier and let it go.

Q. Have you ever had any evidence or any case of spontaneous combustion from wet cargoes of animal or vegetable nature? A. Never, never.

Q. How many refrigerator-cars had been loaded with the silk waste when you saw it?

A. To the best of my recollection there were two and a part of a third. I would not be sure of that. I know that I went into one when it was loaded, because Mr. Taylor and myself had suggested or discussed the advisability of putting a strip of wood between those bales of silk, and I went into one car and I think that there were two loaded, or it might have been one and this was the second. [169]

Q. Were they actually putting in those pieces of wood as you suggested? A. Yes.

Q. You got in there to see it? A. Yes.

Q. What kind of pieces of wood were they using?

A. I think they were two-inch scantling, nothing thicker than that between the bales.

Q. Between each tier of bales?

A. Between each tier of bales; not right over the bales, you understand; a narrow piece of scant-

(Testimony of Charles B. Wheeldon.)

ling that ran from side to side of the car under the tier of bales.

Q. Supporting them? A. Supporting them.

Q. Do you know whether the silk was unloaded or not in those refrigerator-cars?

A. No, I don't know anything about that.

Mr. LYETH.—That is all.

Cross-examination.

Q. (Mr. KORTE.) You spoke of 37 bales of wool that were jettisoned—how did that come about?

A. Well, they jettisoned—if you are familiar with the case—quite a considerable cargo down at Cape Flattery to lighten the ship.

Q. The remaining part of the wool went to San Francisco on the boat, piled up on the outside of the deck?

A. Yes, sir, and I will tell you how that was. [170]

Q. I just wanted to know the facts.

A. We had the advice of the W.-O.

Q. You mean the O. & W.?

A. No—of the Holman, Hart Mill, the wool expert in San Francisco, not to ship by rail as there was great congestion.

Q. Anyway, it was shipped in that condition, outside on the deck? A. Yes.

Q. In the open? A. And that was the reason.

Q. And you know that cotton is about the only material that will not burn by spontaneous combustion? A. Corn won't burn.

Q. It will char?

(Testimony of Charles B. Wheeldon.)

A. I don't know. I have shipped carloads of it and—

Q. Did you ever see it char?

A. No, I have shipped wheat.

Q. And you haven't heard of corn charring?

A. It might char, but not burn.

Q. Well, what is charring but burning—what is the chemical difference?

A. You are getting on the chemical and scientific—

Q. You say it won't burn?

A. I am speaking from the practical point of view.

Q. You would not say that when it is charring it was not burning—you mean that it won't flame?

A. I have never seen it char.

Q. But as I said, cotton is about the only thing that you can ship wet which will not char or inflame?

A. You can ship wool and you can ship cotton and grain.

Q. Wool will burn or char.

Mr. LYETH.—Are you testifying, Mr. Korte?

Mr. KORTE.—I am trying to get the witness to confine [171] himself to my questions.

Q. Wool will burn?

A. I don't know. I have never had any of it spontaneously—

Q. You can't say whether wool will burn or not?

A. I never had a commodity yet that took fire from spontaneous combustion.

(Testimony of Charles B. Wheeldon.)

Q. But with all of the commodities that you have listed in the little book which you just recited or which you read to the men on the boat, the only one there is cotton that won't burn?

A. That is all, because that is applicable to the Texas trade where those boats are trading.

Q. You never heard of hay burning by spontaneous combustion? A. I have not.

Q. Or horse manure?

A. I have not. I have seen cars of it loaded on a siding but never burning.

Q. Usually they transport it only a short distance in open cars? A. I don't know.

Q. You never saw it in boxcars? A. No, sir.

Q. But in order to ship this, you say then that it would require wetting down?

A. I suppose it would. I don't lay so much stress on the wetting down as I do trying to keep the temperature down.

Q. And the purpose of that is to keep the heat down?

A. To keep the heat down and to keep the fiber from disintegrating, the same as with cotton.

Q. And it laid out there in the ocean fourteen days, as the ship's log shows it was fourteen days in the water?

A. No. She stranded on July 30th and floated on the 5th.

Q. The log shows that she stranded July 30th and she came into the dock on the 10th? [172]

(Testimony of Charles B. Wheeldon.)

A. No; she came in on the 7th first and then went to the drydock.

Q. She came in on the 7th and went to drydock on the 10th and then came back to the Tacoma dock on the 11th and started unloading on the 12th, or started unloading cargo then. So, there is a period of fourteen days, from the 30th to the 12th, that that cargo was under water, saturated with sea water all of the time, possibly sometimes full and sometimes not—it would be pretty apt to attack the fiber under those conditions, wouldn't it?

A. I can't speak for silk particularly; I can say that we have cotton under water a year and the fiber is not hurt at all. I think if we could have kept this silk under water until it reached New York, there would be no damage.

Q. You know that there is no comparison between cotton and wool or silk—the two are entirely different?

A. I don't know what the difference between them is regarding spontaneous combustion—I don't know that there is any, personally.

And thereupon it was STIPULATED by the parties as follows:

Mr. KORTE.—I will dictate a stipulation to the record. It is stipulated that if Mr. Lownes were present, whose deposition was read yesterday, he would testify that he received the four bills of lading with the endorsements as shown on the bills of lading, on the 7th day of August, 1918. Mr. Lyeth desired that concession.

Mr. LYETH.—I omitted to ask Mr. Lownes that question when his deposition was taken. [173]

The COURT.—The date of this alleged shipment was the 12th of August?

Mr. LYETH.—The 12th of August.

Deposition of Dr. Arthur D. Little, for Plaintiff.

And thereupon, to further prove the issue on the part of the plaintiff, the deposition of DR. ARTHUR D. LITTLE was introduced and read in evidence, as follows:

(By Mr. LYETH.)

Q. Will you give your full name and address, Dr. Little?

A. Arthur D. Little, 30 Charles River Road, Cambridge, Massachusetts.

Q. Your age? A. Fifty-seven.

Q. What is your occupation?

A. Chemist and Chemical Engineer.

Q. Are you President of Arthur D. Little, Incorporated? A. I am.

Q. Will you state for the record, Dr. Little, your experience as a chemist and chemical engineer?

Mr. KORTE.—Unless you want it in the record I concede the doctor's competency along that line.

Mr. LYETH.—I think I would like it.

A. I studied chemistry at the Massachusetts Institute of Technology and received the degree of Doctor of Chemistry from the University of Pittsburgh. I have been in general practice as chemist and chemical engineer in Boston since 1886 and have

(Deposition of Dr. Arthur D. Little.)

during that period had a very extended contact and experience with industrial applications of chemistry. I served two years as president of the American Chemical Society and also served [174] as president of the American Institute of Chemical Engineers. I am a member of the corporation of the Massachusetts Institute of Technology and Chairman on the departments of chemistry and chemical engineering, and I founded there the School of Chemical Engineering Practice. I am a member of the Executive Committee of the Research Corporation and of Committees of the National Research Counsel, and during the war was consultant to the Chemical Warfare Service and Signal Corps and was called upon to advise the Navy Department and other Government departments on chemical matters. I have had a particularly wide experience in connection with fibers and methods involving their treatment, preparation and use.

Q. Have you been chemist to textile concerns, textile mills?

A. I have been chemist to very many mills employed in the manufacture of textiles and other products from fibrous raw materials.

Q. Have you investigated cases of spontaneous combustion and are you familiar with those phenomena? A. I have and am.

Q. Are you familiar, Dr. Little, with what is known as Canton steam silk waste, known as No. 1 and No. 2 grades? A. I am.

Q. Will you state whether or not, in your opinion,

(Deposition of Dr. Arthur D. Little.)

Canton steam silk waste of either of these grades, when wet with sea water, is anyway liable to ignite from spontaneous combustion?

A. In my opinion, it is not.

Q. Will you describe the chemical action that takes place when Canton steam silk waste is wet with sea water?

A. The action taking place is not, strictly speaking, chemical. The waste always contains some bacteria, and as a result of their life processes fermentation may occur, and this, of course, always involves some chemical change. [175]

Q. What is the effect of fermentation?

A. It commonly results in a moderate rise in temperature and a gradual breaking down of the sericin or silk glue, with development of ammonia.

Q. Is it possible for sufficient heat to be developed by fermentation to cause any danger of spontaneous combustion or ignition in the material?

A. In my opinion, it is not.

Q. Will you explain the difference, Dr. Little, between fermentation and exothermic reaction?

A. Fermentation is the result of the life processes of animal or vegetable organisms and can only proceed under ordinary conditions while these are alive and functioning. Few if any of them can survive for any considerable period of time temperatures much if any above 212° Fahrenheit, and upon their death the fermentation and the results therefrom must necessarily cease. This temperature is, of course, far below that required to induce spon-

(Deposition of Dr. Arthur D. Little.)

taneous combustion. In some cases, however, as for example, that of dirty rags impregnated with an oxidizable oil, fermentation may set in if the material is damp or wet and be responsible for an initial rise in temperature. Such increase in temperature due to fermentation must, however, presently cease by reason of the death of the organisms responsible therefor. We have, however, here a new factor because of the well known tendency of certain vegetable oils, like linseed oil, to absorb oxygen, this absorption being attended by the evolution of heat. If the material thus heating is in sufficient volume or otherwise so placed that there is not a ready loss of heat through conduction or radiation, the temperature of the material rises and the tendency to oxidation accelerates as the temperature goes up, with the result that higher [176] and higher temperatures are reached and ultimately a temperature sufficient to cause ignition. This process is one occurring in many materials and is generally known under the name of spontaneous combustion. The point which I would particularly make, however, is that it is not due to fermentation but to the chemical action superadded to the effects of fermentation.

Q. Is there present in Canton steam silk waste such an oxidizing oil as you have described?

A. No.

Q. What is the explanation of fires which are known to frequently occur in coal which has been wet?

(Deposition of Dr. Arthur D. Little.)

A. There is perhaps no universally accepted theory for the cause of such fires, but that which finds most general acceptance is that the heating up is due to the slow oxidation of sulphur compounds—perhaps more generally sulphites of iron—contained in the coal.

Q. Is there any sulphur in the Canton steam silk waste? A. No.

Q. Is there any chemical action other than fermentation which could take place in wet silk waste which would produce heat or any reaction that could be superadded to fermentation?

A. None that I know of; nor do I believe that any such would take place.

Q. Assume, Dr. Little, that a cargo of 500 bales of No. 1 Canton steam silk waste and 367 bales of No. 2 Canton steam silk waste had been stowed in the hold of a steamer which had stranded in Puget Sound, causing the hold in which the silk waste was stowed to become flooded and that this stranding occurred on or about August 1, 1918; that the steamer was thereafter floated and that the silk waste unloaded on open [177] wharves at Tacoma, Washington, from August 7 to August 10, and that it had been wet down with a hose while on the wharf; and assume further that it had been loaded in refrigerator-cars and had been transported across the continent to Providence, Rhode Island, by what is known as silk train service, occupying about six days, and that the silk had arrived at Providence between August 21 and August 30, a period of from

(Deposition of Dr. Arthur D. Little.)

three to four weeks since the original wetting,—will you state whether or not, in your opinion, there would have been any danger whatever of excessive heating or of spontaneous combustion in that cargo?

A. In my opinion, there would have been neither.

Q. Are there many articles of commerce commonly transported by railroads of an animal or vegetable origin which are known to heat when wet and which are in no way dangerous due to excessive heating or liability to spontaneous combustion?

(Objected to as immaterial and irrelevant.)

A. There are.

Q. Will you enumerate some of them?

A. Cotton; stable manure; wood pulp.

Q. Would a stable or horse manure, in your opinion, heat to a greater extent than steam silk waste?

A. It is very much more liable to heating and will heat up faster. It will presumably go to a higher temperature by reason of its larger proportion of fermentable material, and vastly greater content of fermenting organisms.

Q. Is there any danger of spontaneous combustion? A. There is none, in my opinion.

Q. Have you ever heard of its catching fire?

A. I never have, and it is not commonly regarded as liable to do so.

Q. And it is an article of commerce commonly shipped by railroads?

A. Commonly shipped by railroads, largely stored in cities and in wooden structures generally. [178]

(Deposition of Dr. Arthur D. Little.)

Q. Any danger of spontaneous combustion in wood pulp when wet?

A. No, wood pulp is very commonly indeed shipped wet, not only by railroads but in wooden sailing vessels.

Q. Does it heat from fermentation?

A. I cannot say that it doesn't, but such heating has seldom or never been brought to my attention.

Q. What about the raw material used in the manufacture of cordage—whether or not the manila fibers are liable to heating when wet?

A. They are, and one of the usual methods of preparing such fibres for use involves such heating through fermentation as is known as "batching." Vast quantities of cordage fibres are treated in this way, as, for example, in the great plant of the American Manufacturing Company, located in Brooklyn.

Q. Are you the chemist for that company?

A. I was their chemist for three years and was chemist for many years for the Plymouth Cordage Company.

Q. Are the manila and sisal fibres inoculated to promote fermentation in the process of manufacture? A. They are in some cases.

Q. Is there any danger of spontaneous combustion from the heating produced in those fibres?

A. I have never known or heard of a case of ignition of such material attributed to spontaneous combustion.

(Deposition of Dr. Arthur D. Little.)

Q. What about the waste vegetable matter in the manufacture of sugar from sugar cane?

A. The cane after going through the crushing rolls of the centrale still contains about one-eighth of its original proportion of sugar, and as the extraction is carried on in tropical or semi-tropical countries the conditions of temperature are peculiarly favorable to fermentation, and this waste, known as bagasse, is particularly liable to fermentation. [179] It is commonly burned almost immediately under the boilers, but if for any reason the amount of waste produced is greater than the immediate requirements of the boilers, it is common practice to load the bagasse on to cars and hold it until the boilers are ready to receive it. I have never known of a case of spontaneous combustion in bagasse, although I have made particular inquiry concerning this. I may say that I am Research Director for the United Fruit Company, operating great sugar plants in Cuba.

Q. And have you conducted experiments with bagasse?

A. We have conducted a great many experiments with bagasse, but not with this particular point in mind; and we have built a paper-mill in Hawaii to work up bagasse into paper, and in this mill great quantities of wet bagasse are stored.

Q. Does it by any means follow, Dr. Little, that because animal or vegetable matter is heating there is any danger of spontaneous combustion?

A. It does not.

(Deposition of Dr. Arthur D. Little.)

Q. To a person having experience in handling commodities and cargoes ordinarily shipped on railroads in the United States, is there any reasonable justification for assuming that because a cargo of Canton steam silk waste which has been wet with sea water is heating to a certain degree and giving off ammonia—in assuming that the cargo is dangerous or liable to spontaneous combustion if transported?

And to that question the counsel for the defendant objected, on the ground that it called for an opinion as to the ultimate facts to be passed upon by the Court, and did not call for an opinion upon a matter provable by the testimony of an expert witness, and on the further ground that the witness is not qualified to testify as an expert in answer to that question.

The witness was permitted to answer the question, as follows: [180]

A. In my opinion, there is none, both for the reason that silk waste is well known not to be subject to spontaneous combustion, and for the further fact that the ammonia evolved is in itself an efficient fire extinguisher.

And the defendant excepted to the ruling of the Court admitting said answer in evidence, and his exception was allowed.

Referring to my hypothetical question regarding the cargo of 500 bales of No. 1 steam silk waste and 367 bales of No. 2 Canton steam silk waste, assume that the cargo was unloaded on to the open dock at

(Deposition of Dr. Arthur D. Little.)

Tacoma, Washington, and that it began to heat, give off ammonia fumes, and that it was wet down by hose and that part of the cargo had been loaded into refrigerator-cars which were to be iced during transit across the continent,—will you state whether or not, in your opinion, there would be any reasonable grounds for assuming that the cargo was dangerous or in any way liable to spontaneous combustion?

Mr. KORTE.—I make the same objections to this question I made to the previous one.

A. In my opinion there were no reasonable grounds for such assumption.

Q. Would the icing of the refrigerator-cars in which the silk waste was to be stowed tend to check or accelerate fermentation?

A. Check it—or at least to inhibit it.

(Conference between counsel.)

Mr. KORTE.—Subject to objection of immateriality. The questions which counsel now propound to the witness may be asked.

Mr. LYETH.—It being understood that if the rules that are to be inquired about are not applicable, the questions and answers may be stricken out.

Mr. KORTE.—Yes.

Mr. LYETH.—On consent.

Mr. KORTE.—It is all right. [181]

Q. Are you familiar with the commodities generally classed as textile waste? A. I am.

Q. What does that term include?

(Deposition of Dr. Arthur D. Little.)

A. Wastes from the operations of spinning and weaving in the textile mill.

Q. That is, you mean the sweepings and waste products that occur in the manufacture of the raw materials in this country?

A. Into the finished products?

Q. Into the finished products. A. Yes.

Q. Does Canton steam silk waste come under such a term? A. I should not so regard it.

Q. Has that article been manufactured in any way? A. It has not.

Q. I show you pamphlet entitled:

"INTERSTATE COMMERCE COMMISSION. REGULATIONS FOR THE TRANSPORTATION OF EXPLOSIVES AND OTHER DANGEROUS ARTICLES BY FREIGHT,"

dated September, 1918, page 49 thereof, article 1801, regarding "Forbidden Articles." Subsection (d) reading as follows:

> "Rags or cotton waste oily with more than 5 per cent of vegetable or animal oil, or wet rags, or wet textile waste, or wet paper stock,"

and ask you whether Canton steam silk waste could properly or reasonably be classified under any of these words?

And to that question the defendant objected, and notwithstanding his objection, the witness was permitted to answer as follows:

A. It is certainly not to be classified as rags or cotton waste oily with more than five per cent of vegetable or animal oil, since the Canton steam

(Deposition of Dr. Arthur D. Little.)

silk waste contains practically no oil and has moreover not been processed in any such sense as rags or cotton waste. Neither can it be classed as wet rags or wet paper [182] stock, nor as wet textile waste, for the reason in the latter case that it bears the same relation to cotton or other textile waste that raw cotton or cotton linters bear to the waste of the textile mill. It is in fact, although called a waste, a valuable and well recognized raw material for an important manufacture.

And to the admission of said testimony the defendant excepted and his exception was allowed by the Court.

Q. What is the commodity you referred to as cotton linters?

A. In the operation of ginning cotton there is left behind a certain proportion of shorter fibre, which, when separated from the seed, is known as linters.

Q. What is the Canton steam silk waste?

A. Canton steam silk waste is the product of the initial treatment of the cocoons in China and consists of pierced cocoons or material which otherwise cannot be drawn off into filature.

Q. Is filature the long strands ordinarily known as raw silk? A. It is.

Q. Which is manufactured by the throwsters?

A. It is.

Q. Does the Canton steam silk waste bear the same relation to raw silk as cotton linters bear to raw cotton? In my question I am excluding the

(Deposition of Dr. Arthur D. Little.)

commodity known as pierced cocoons.

A. It does in a general sense, although of course such analogies cannot be pushed too far.

Q. Does the silk waste contain the shorter fibres produced from the cocoons which cannot be used by the throwsters as raw silk? A. It does.

Q. Does the Canton steam silk waste contain generally the same chemical materials as raw silk or filatures?

A. It does; it is the same material chemically. [183]

Cross-examination by Mr. KORTE.

Q. You spoke of fermentation and exothermic action, Doctor? A. Yes.

Q. I didn't quite understand the exothermic action, what relation that has to organic matter?

A. An exothermic reaction is one which evolves heat during and as a result of the chemical changes taking place. The reactions involved in ordinary combustion are exothermic reactions.

Q. In what kind of organic matter or material?

A. In the burning of wood and coal, for example.

Q. Is there exothermic action connected with the fermentation of silk waste?

A. The development of heat during fermentation is due to the reactions induced by the life processes of the animal or vegetable organisms responsible for the fermentation, and I would not class these as exothermic chemical reactions in the usual sense. They do, of course, develop heat.

Q. What, then, would be the highest degree of

(Deposition of Dr. Arthur D. Little.)

heat which the silk bale would attain under fermentation alone without any exothermic reaction?

A. The limiting temperature would be that at which the organisms are killed, and this would be not much above 212 degrees.

Q. Could you hold your hand on the bales at that heat, or would it be too severe?

A. You couldn't hold your hand at such maximum temperature for more than a very brief period of time.

Q. It would be difficult or almost impossible to handle a bale that was heated to that extent?

A. The temperature within the bale would presumably be higher than at the surface, but if the temperature at the surface approached this maximum, the bale could not be handled except by hooks or mechanically. [184]

Q. Now, if the degree of heat was greater than 212 you would necessarily conclude that the waste silk had been exposed to some other organic matter which was producing the heat?

A. If the temperature rose substantially above 212 degrees I would assume that the higher temperature was the result of chemical rather than fermentative action.

Q. What products would be apt to produce that chemical action that you might say was possibly present?

A. If the silk waste had been saturated or contaminated with a vegetable drying oil as, for example, linseed oil, that would be sufficient to ac-

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count for a notable increase in a temperature above 212 degrees.

Q. If there was any danger from shipping the cargo in the condition which has been named to you, there would be no necessity of icing it, would there, in so far as spontaneous ignition is involved?

A. There would not, for that reason.

Q. What gases and fumes would be thrown off in the fermentation of the waste bales?

A. Ammonia in large amounts, some carbonic acid gas, and perhaps others.

Q. Are they inflammable or poisonous?

A. They are not inflammable. Ammonia, if inhaled in sufficient quantity, would be poisonous, but fortunately it is so extremely pungent that it gives ample warning of its presence and cannot ordinarily be inhaled in poisonous quantities.

Q. You could inhale sufficient, though, to overcome one coming in contact with it?

A. If he were locked in the car or could not otherwise get away.

Q. But he may be overcome before he could get away, is the probability in coming in contact with gas of fumes of that kind?

A. I would not think so under the conditions predicated. [185]

Q. Of course, Doctor, you are testifying from the viewpoint of your technical knowledge, and right here (without waiving my objections to the question put to the Doctor relative to whether or not there is any reasonable belief in the person who

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rejected a shipment that he should have rejected it); would your answer be different if you had not had that technical knowledge and were an ordinary layman in dealing with the subject under the conditions of a cargo of waste silk saturated with sea water, fuming profusely, smoking, hot to the extent that you could not place your hand in the bale and keep it there any time whatever—that that particular commodity or freight was fit for shipment, to be handled by men?

Mr. LYETH.—I object to the question, as it predicates facts that have not been shown to be existent and does not state correctly facts which actually did exist.

Q. You may assume, Doctor, the facts which I have stated to you as true.

A. I am testifying not only from my technical knowledge but from my general knowledge and keeping always in mind matters of common knowledge, such, for example, as the tendency of materials like stable manure to ferment and their freedom from danger of spontaneous combustion, and the general knowledge in the silk and insurance businesses that silk waste is not liable to spontaneous combustion, and from these considerations and the knowledge derived from such sources, as well as from my technical knowledge, I would regard to material as certainly quite as fit for shipment as, for example, a car of steaming stable manure.

Q. Now place yourself, Doctor, in the position of

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the freight agent who had to do with this shipment; you had no knowledge of the compounds of silk waste or what it was, no knowledge of chemistry, of course, or bacteriology, and you saw this condition with the silk waste being saturated, fermenting, and, as I [186] said, fuming to the extent it looked like smoke and had all the appearances to the common ordinary person that it was heating to the point of burning,—would you under those conditions take the position you now take as a chemist, or would you have rejected the shipment as unfit to carry?

Mr. LYETH.—Do you refer, Mr. Korte, to the freight claim agent or the assistant freight claim agent?

Mr. KORTE.—Yes, the man, whoever it was, who dealt with it; the ordinary layman, as I have described.

Mr. LYETH.—I object to the question in so far as it described the condition of the bales as heating to the point of burning, and in other respects as not stating correctly the facts.

Q. You understand my question?

A. I have had considerable experience with railroads and with railroad officials. I was in fact—

Q. Well, now, Doctor, can you answer that without chastising some railroad official?

A. I wasn't going to chastise him; I was going to give him a boquet. I was in fact chemist to the Canadian Pacific Railway and made very extensive trips over its lines, and my estimate of the

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mental capacity and knowledge of their business possessed by railway freight agents and their familiarity with the general characteristics of materials offered for freight would lead me to believe that an agent to whom a valuable shipment of common material were thus presented would be and should be expected to possess the common knowledge of its relations to spontaneous combustion. [187]

Q. You are limiting your answers, are you not, Doctor, in stating spontaneous combustion, to a flame or ignition—to that extent? A. I am.

Q. Yes. We have, then, this situation—and this is confined strictly to the cross-examination on your answer to the hypothetical question that an ordinary person would have no reason to reject a shipment under those conditions—three chemists learned in the profession, maintaining that there was danger to life and property if that shipment went forward; on the other hand, we have three or four other chemists, including yourself, just as learned, who maintain there was no danger. Under those conditions, would an ordinary scrub freight agent who has no knowledge be blamed for taking one or the other positions when your own profession disagree on the subject? Now, assuming that is the situation, you would hardly blame him, would you, Doctor?

A. He might very well be in doubt under those circumstances.

Mr. LYETH.—I wish to enter an objection to the

(Deposition of Dr. Arthur D. Little.)

assumption of fact that it is not shown and does not exist.

Mr. KORTE.—Well, of course, the situation will be shown.

Q. You mentioned, Doctor, linseed oil as a matter which would produce exothermic and chemical reaction. Can you name any other oil that might produce the same reaction?

A. Cottonseed oil in a less degree.

Q. Cocoanut oil?

A. Any drying oil. Cocoanut oil is not commonly regarded as a drying oil, and I am inclined to think it should not be so classed.

Mr. KORTE.—You put in that set of rules in case they are material. I would like to have them in myself. They can go in as a part of the [188] record and if they have anything to do with the case they either go in or stay out, if you don't mind.

(Pamphlet entitled "Interstate Commerce Commission Regulations for the Transportation of Explosives and other Dangerous Articles by Freight," marked "A for Identification. Frank H. Burt, Notary Public.")

Redirect Examination by Mr. LYETH.

Q. Dr. Little, you were asked to assume that the maximum temperature of the bales was 212 degrees, and whether or not it could be handled by a man with the hands. Will you state from your experience whether or not it would be possible for a bale

(Deposition of Dr. Arthur D. Little.)

of Canton steam silk waste of the usual size, containing approximately 133 pounds, which had been wet with salt water, to attain on the outside any such temperature as 212°?

A. I do not believe that it could attain such temperature, partly by reason of the presence of the salt water and the large amount of heat which would be absorbed by the steam necessarily generated at that temperature, or even below it, and the opportunity for radiation from the outside of the bale.

Q. (By Mr. KORTE.) That is a single bale you are speaking of now?

A. Yes, exposed to the air.

Q. (By Mr. LYETH.) Would the bales of steam silk waste referred to in my hypothetical question, in your opinion, contain as high a temperature from fermentation as 212°?

A. I do not believe so, and in our own experiments at this laboratory we were unable to obtain such temperatures.

Q. Would the steam silk waste heat as much as stable manure? A. It would not.

Q. Would the bales of wet silk waste referred to in my hypothetical question attain a degree of heat that would render it impossible [189] to handle them, in your opinion?

A. I can see no possibility of its attaining such temperature and find it difficult to believe that such temperature was in fact attained.

Q. Assume in addition to the facts set forth in

(Deposition of Dr. Arthur D. Little.)

my hypothetical question that in the same hold of the ship there had been stowed beans and rice, and that when the bales were unloaded from the ship there were beans and rice sticking to the straw surrounding the bales,—would that, in your opinion, affect the heating to any material extent so as to increase the heat? A. Not materially.

Q. What effect would the wetting down of the bales by hose while on the wharf have?

Mr. KORTE.—In fresh water or salt water?

Mr. LYETH.—I assume that it was fresh water.

A. The effect of either fresh or salt water would be to lower the temperature of any portions of the bale to which the water penetrated, and of course to immediately lower the surface temperature, which would become substantially that of the water for the time being.

Q. Could the ammonia fumes coming off the bales of wet silk waste such as I have described in my hypothetical question have been regarded in any way as poisonous to men handling them and loading them on cars?

Mr. KORTE. — I think he answered that very fully.

A. I think it altogether improbable. We have operated in our basement on a semicommercial scale processes which charged the atmosphere of the room with ammonia vapors, with no ill effects at all to those engaged upon the work.

Q. Were those ammonia fumes the product of fermentation? A. They were not.

(Deposition of Dr. Arthur D. Little.)

Q. (By Mr. KORTE.) Then it would depend upon one's olfactory nerves, [190] would it not, Doctor,—Some are more sensitive than others?

A. Is that a question?

Q. Yes.

A. No. My position is that an atmosphere containing a dangerous or poisonous amount of ammonia would be so unpleasant that the men would not work in it.

Q. (By Mr. LYETH.) Would the fact that approximately three carloads of this silk waste under the conditions that I have assumed in my hypothetical question had been loaded on refrigerator-cars at the time that the freight claim agent ordered that they be not shipped, indicate to you whether or not the fumes of the ammonia were dangerous or not, and assuming, of course, that they were out on an open wharf?

The WITNESS. (To the stenographer.) Read the question.

(Question read.)

A. If I understand your question, the fact that the cars were loaded simply shows that at the time when the bales were introduced into the cars the amount of ammonia gas evolved was not sufficient to prevent the workmen from handling the bales. The fact that the cars were refrigerator-cars, if I am right in assuming them to be iced at the time, justifies the assumption that the fermentation was rendered less active by the lowering of temperature.

(Deposition of Dr. Arthur D. Little.)

Q. Assume, Dr. Little, the conditions that I have outlined in my hypothetical question on direct examination up to the time that the bales of silk waste had been standing on the dock for several days and had been wet down with a hose, and further than approximately half of the cargo had been loaded in refrigerator-cars, some three cars having been loaded; and assume further that the assistant freight claim agent of the defendant railroad — Chicago, Milwaukee & St. Paul—had at that time directed that the cars be unloaded and that the cargo be not shipped. [191] unless frozen or dried,—whether or not, in your opinion, from your general experience, such freight claim agent was reasonably justified in assuming that the cargo was dangerous or liable to spontaneous combustion— and assume further that it was intended that the refrigerator-cars be iced as soon as loaded.

And to that question the defendant objected, for the reason that it calls for an opinion upon the ultimate facts in this case and an opinion which an expert cannot be permitted to express, and is, therefore, incompetent; but, notwithstanding said objection, the witness was permitted to answer as follows:

A. I do not think he would be so justified.

And to the admission of that testimony the defendant excepted and his exception was allowed by the Court.

Q. Whether or not a freight claim agent of such a road ought to have known the commodity known

(Deposition of Dr. Arthur D. Little.)

as Canton steam silk waste with its relation to the possible danger of spontaneous combustion?

And to that question the defendant excepted for the reason that it calls for an opinion upon a man's mentality; but, notwithstanding said objection, the witness was permitted to answer, as follows.

A. Canton steam silk waste is a commodity of such well known character and frequent shipment and commercial value that those engaged in its transportation, and particularly the freight agents of transcontinental railroads, by which such material is commonly transported, might, it seems to me, in my opinion, be properly assumed to possess the general knowledge of its properties and characteristics as regards any tendency to spontaneous combustion. In other words, they should know that it is commonly recognized that it has no such tendency.

And to the admission of that testimony the defendant excepted and his exception was allowed by the Court.

Recross-examination by Mr. KORTE.

Q. Well, suppose, Doctor, another person, a marine surveyor, had examined the cargo and he pronounced it unfit for shipment— [192] would you criticise his judgment from the layman's standpoint he ordered to reject it, we will say?

A. I am not able to call up any mental picture of a marine surveyor, as I never happen to have met one and am not familiar with his duties or the requiremets of his position.

(Deposition of Dr. Arthur D. Little.)

Q. His duties are to, examine all cargoes as to their fitness or unfitness for shipment. That is his special business and he is constantly at that work all the time. Now, he passes on it and says "Unfit for shipment" from an examination such as you would make with the naked eye and with the hands, and so forth.

A. I should suppose that a man so qualified as such an inspector at a Pacific Coast terminal, where raw silk and silk waste are a common and important article of import, would be expected to know or at least to inform himself as to the characteristics of the material, and that if he rejected it as you state—

Q. Yes.

A. —he did so on ignorance of its character as commonly recognized.

Q. You would give his judgment, though, consideration if you were a carrier, if he passed on it, would you not? It would be worthy of consideration in that viewpoint—strictly from that viewpoint, Doctor?

A. If he were in my employ and assigned to that job I would certainly give consideration to his opinion until I had found that he was making mistakes of that sort.

Q. Yes. And if, further than that, a chemist had made a visual inspection of the commodity as it then existed—now assuming not from his hypothetical question to you, but a chemist made a visual inspection of the cargo as it was tendered to

(Deposition of Dr. Arthur D. Little.)

the Railway Company,—would you give his judgment consideration—and he had said it should not be moved, as it was dangerous to life and property? [193]

A. I would, but I would at the same time point out that here is a difference and sometimes a profound difference in the weight which may properly be attached to the opinion of different chemists.

Mr. KORTE.—Well, we will say that he was a man of ordinary experience, intelligent in his profession, such as we find in the doctor's profession and the lawyer's profession. There are some lawyers that are better than others. That is all, Doctor.

Deposition of Edward A. Barrier, for Plaintiff.

And to further prove the issue on the plaintiff's part, the deposition of EDWARD A. BARRIER was introduced and read in evidence as follows:

(By Mr. LYETH.)

Q. Will you give your full name and residence, Mr. Barrier?

A. Edward A. Barrier; 18 Center Street, Cambridge, Massachusetts.

Q. Your age? A. Thirty-six.

Q. What is your occupation?

A. I am Assistant Chief Engineer of the Inspection Department, Associated Factory Mutual Fire Insurance Companies.

Q. Are you a chemical engineer?

A. I am a chemical engineer, graduate of the

(Deposition of Edward A. Barrier.)

class of 1905, Massachusetts Institute of Technology.

Q. What has been your experience in chemical work since graduating from Technology?

A. Following my graduation I was assistant instructor in chemistry in the Institute of Technology for one year. The year following that I was instructor in the University of Cincinnati for one year. [194]

Q. In chemistry?

A. In chemistry. And since that time, 1907, I have held various positions with the organization that I am now connected with, first as chemical engineer, and then director of laboratories and more recently assistant chief engineer.

Q. Will you describe briefly the organization with which you are connected and what its purpose is?

A. There is an association of twenty factory mutual insurance companies who have combined in forming an inspection department, whose duties are, first, inspection of property and adjustment of losses, and also all questions relating to fire protection and engineering study; and the department maintains laboratories which concern themselves with the study of fire protection devices and study of causes of fires and methods of preventing fires. In other words, the organization makes a special scientific study of all matters, causes and ways of preventing fires, gaining much of their experience from actual experience in the field. Every fire of

(Deposition of Edward A. Barrier.)

any consequence is studied right on the ground and every fire is reported, and all these matters, of course, are kept on record. Whatever lessons or conclusions may be learned are drawn from the occurrences.

Q. What have been your duties in connection with this work, Mr. Barrier?

A. As chemical engineer my duties were varied; in testing fire protection devices where chemical qualifications were necessary, and particularly in connection with fires, I have investigated cases where fires have occurred where chemistry was involved and in which a knowledge of chemistry was necessary. I have made a special study of spontaneous ignition, and in fact all fires where chemistry played any part. And as director of laboratories, of course that has been still one of my duties, to supervise that work as well as activities in other lines; [195] and as assistant chief engineer part of my duty is to pass on all fire reports that are issued by the organization, giving instruction as to what subjects shall be investigated further if thought desirable.

Q. Have you made any study of the properties or tendency of textiles toward spontaneous combustion? A. I have, to a considerable extent.

Q. Are the companies which are members of your association insurers of textile mills throughout the country?

A. Yes, I think that no doubt the Factory Mutual Companies insure more than a majority of the large

(Deposition of Edward A. Barrier.)

textile plants—the larger textile plants, including cotton, wool and silk.

Q. Are you familiar with Canton steam silk waste of the grades of No. 1 and No. 2?

A. In a general way, as related to its properties from a fire standpoint.

Q. Have you investigated and considered the properties of that commodity of those two grades, as to whether or not it is liable or possible to ignite spontaneously? A. I have.

Q. Is it possible for Canton steam silk waste of the grades of No. 1 and No. 2 which has been wet with either fresh or salt water to ignite spontaneously? A. In my opinion, it is not.

Q. What action takes place in the silk waste when it is wet with salt water?

A. Why, certain fermentation in a case where a silk is wet with salt water to a limited extent will take place on the gummy substance which the silk is coated with. That fermentation is a bacterial action and gives off some heat, a limited amount of heat. [196]

Q. Does it heat excessively?

A. I should say not.

Q. Roughly, what temperature would it attain when wet?

A. I doubt if the temperature would exceed 140 to 150 degrees Fahrenheit.

Q. Do you think it is possible that it would go as high as the boiling point of water, 212 degrees?

A. I do not.

(Deposition of Edward A. Barrier.)

Q. What happens to the bacteria—the bacterial action—when the top limit of heat is reached?

A. Why, the bacteria are killed by the temperature which to them is excessive and the action gradually decreases and the temperature falls at the same time. That is, the temperature gradually rises until it reaches a peak. At that point the bacteria are killed off and then the temperature gradually declines.

Q. Have you ever known of or experienced a fire in Canton steam silk waste due to spontaneous combustion?

A. I have only known of two fires in any kind of raw silk, and those have occurred recently. I am not sure whether those were of silk waste, or, if they were silk waste, whether they were of this particular grade. I think they were silk waste; of that I am not sure.

Q. (By Mr. KORTE.) Pardon me, are you speaking from personal knowledge or from a report on it?

A. I am speaking of personal knowledge.

Q. Personal examination?

A. And records that have come to my attention in connection with my duties.

Q. I mean, in the two fires that you speak of, did you make a personal examination? [197]

A. Those two fires were reported to us and my duty was to have them investigated, which was done. One of my assistants visited the plant and

(Deposition of Edward A. Barrier.)

later performed some experiments under my direction.

Q. (By Mr. LYETH.) What was the state of the material in these fires that you have in mind?

A. The material had been treated with an oil preparation and had been placed in a dryer and heated to a temperature of 275°, and the ignition took place inside the dryer.

Q. Where were these fires?

A. Cheney Brothers Silk Company in Manchester, Connecticut.

Q. When did they occur?

A. Why, recently; I don't know the exact date. I think sometime in October.

Q. I show you pamphlet headed "Boston Manufacturers Mutual Fire Insurance Company. Monthly report of fires and losses" and on page 2 thereof, under Nos. 11 and 13, and ask you if those are the reports of the fires that you have in mind?

A. Those are the reports, and I might say that these reports as they are here were before the matter had been investigated at the plant and in our laboratories. That is, these were the reports that we received.

Q. Have subsequent reports been made?

A. There has been a laboratory report made which was sent to the insurance companies—the Boston manufacturers, which is one of our associated companies—and also to the Cheney Brothers. I can tell

(Deposition of Edward A. Barrier.)

you the conclusions of the subject matter of the report.

Q. Will you just state them?

A. My conclusions of the report were that the cause of the fire was the oil with which the material had been treated, and as contributory cause, exposure to the high temperature in the [198] dryer.

Q. What kind of oil was it?

A. I don't know what kind of an oil it was. That was not determined.

Q. What effect would oil have that is impregnated with silk?

A. If it was an oil of an oxidizing nature, as this material evidently was, it would be subject to oxidation and that would produce a temperature high enough to char the material.

Q. Is there any oil of an oxidizing nature present in Canton steam silk waste?

A. There is not, normally.

Q. In your opinion, can fermentation alone result in spontaneous combustion in material?

A. No. Fermentation alone—

Q. Yes.

A. —cannot, in my opinion. By that I mean that the direct cause of the fire would not come from the fermentation process. Fermentation might be the indirect cause in certain materials.

Q. Is it a generally well known fact that many—in fact, most—substances of animal or vegetable origin when wet will ferment and give off a certain amount of heat?

(Deposition of Edward A. Barrier.)

A. I should say that it is generally known among those who know anything about the subject at all, and it is a subject of, I think, general knowledge with reference to certain materials.

Q. Such as?

A. Well, manure, for instance, tankage and hay. Those that know anything about the properties of hemp know that it heats—and jute.

Q. (By Mr. KORTE.) What is jute?

A. Jute is an Indian fibre that is used largely in the manufacture of rope and bagging, and to some extent is used for the cheaper grades of carpet. Jute yarns are made, woven in [199] carpets. It is a woody fibre that comes from the jute plant, that grows in India, and the fibres are very long. They are separated, more or less separated, by a process that it is subject to before it comes to this country; but even as it comes here, when it arrives there will be bundles of fibre that look something like soft bark and it has to be put through processes to separate the fibres—a heckling process, something similar to what is used in the linen industry. A very long course fibre is produced.

Q. (By Mr. LYETH.) Is that a process of maceration or fermentation?

A. You mean previous to being shipped here?

Q. Yes.

Q. And here?

A. Not here. That is purely a mechanical process.

Q. Is there any danger of spontaneous combus-

(Deposition of Edward A. Barrier.)

tion in these materials that you have mentioned?

A. Some authorities claim that there is danger of spontaneous ignition in hemp and jute. Personally, I doubt it. From my experience and study of the matter I doubt very much if it can occur. We have performed laboratory experiments with both materials to determine, if possible, whether they are subject to spontaneous ignition, and in the case of hemp we succeeded in obtaining a maximum temperature of above 160 degrees and in jute the maximum temperature was somewhat lower than that; I believe about 140 or 150. That is as high as the temperature went and from that point it gradually decreased.

Q. That is nowhere near the ignition point?

A. Oh, no.

Q. Will you state whether or not the presence of the salts in sea water in the case of Canton steam silk waste being wet [200] with sea water would have a tendency to check or accelerate the fermentation process and the consequent giving off of heat?

A. It would have a tendency to check the process because a fermentation is purely a bacterial action and the presence of the salt would interfere with the bacterial activities or the activities of the bacteria. It would act more or less as a mild poison to the bacteria; to what extent would depend, of course, on the amount of salt present.

Q. Assume, Mr. Barrier, that a cargo of 500 bales of No. 1 Canton steam silk waste and 367 bales of

(Deposition of Edward A. Barrier.)

No. 2 Canton steam silk waste had been stowed in the hold of a steamer which stranded in Puget Sound, resulting in the flooding of the hold in which the silk was stowed, and that this occurred on or about August 1, 1918; that thereafter the ship was floated and the silk waste unloaded on an open wharf at Tacoma, Washington, between August 7 and 10 and that the bales had been wet down with a hose; and assume further that the silk had been loaded in refrigerator-cars and transported across the continent to Providence, Rhode Island, by a silk train service, which would occupy a time in transit of about six days, so that the silk would arrive in Providence between August 21st and August 30th, a period of three to four weeks after it had been originally wet,—will you state whether or not, in your opinion, there was any possibility or danger of spontaneous combustion in the cargo during transit?

A. I believe there would be no danger of spontaneous ignition.

Q. Assume further that the refrigerator-cars were iced during transit, would that tend to increase or reduce the danger of spontaneous combustion?

A. It would tend to decrease it if such a thing could occur.

Q. Would the icing tend to check fermentation?

[201] A. It would.

Q. Assume the facts that I have stated in my hypothetical question up to the time that the bales of silk were unloaded on the wharf, and assume that

(Deposition of Edward A. Barrier.)

they were wet down with a hose and that approximately one-half of the cargo had been loaded in refrigerator-cars, and that the assistant freight claim agent of the defendant railroad, the Chicago, Milwaukee & St. Paul, had at that time directed that the silk be unloaded from the refrigerator-cars and that it be not shipped unless it was first frozen or dried,—whether or not such claim agent would have been reasonably justified in assuming that the wet silk waste was a dangerous commodity to be transported and liable to spontaneous combustion?

And to that question the defendant excepted, on the ground that it calls for the conclusion of the witness upon the ultimate facts and relates to an opinion in relation to the facts which do not involve technical knowledge or the knowledge of an expert, and, therefore, the witness is incompetent to testify as to such matters. But, notwithstanding said objection, the witness was permitted to answer the question as follows:

A. I do not consider that the freight agent would be justified in taking that action. I might say that my reason for that is this: That I believe that a man whose duties are to pass on such important questions as that should be familiar at least with the general properties of the materials with which he is dealing, and the properties of raw silk with reference to the possibility of spontaneous ignition, such as are generally known amoung those that are qualified to give information on the subject, can be easily obtained.

(Deposition of Edward A. Barrier.)

And to that answer the defendant excepted and his exception was allowed by the Court.

Q. Mr. Barrier, is it a matter of common knowledge among men who handle Canton steam silk waste as distinguished from chemical experts that it is not liable to spontaneous combustion? [202]

A. I should say it is.

Q. Can you burn the stuff?

A. I don't understand just what you mean by burning it. If you mean by that whether or not it will support its own combustion and burn with a flame, I should say no. Of course, the material can be exposed to heat from some other burning substance and will char, carbonize, but it is a very poor supporter of combustion and won't maintain its own combustion under ordinary conditions.

Q. Well, it won't burn through a mass if flame is applied to it? A. Oh, no.

Q. Is the fact that a commodity of animal or vegetable origin heats from fermentation, alone reasonable ground for assuming that it is a dangerous commodity to transport or that it is liable to spontaneous combustion?

And to that question the defendant objected, on the ground that it called for an opinion on the ultimate facts and not an opinion relating to anything which calls for technical knowledge. Notwithstanding said objection, the witness was permitted to answer as follows:

A. I should say not. The railroads are regularly transporting material which is subject to heating which does not ignite spontaneously.

(Deposition of Edward A. Barrier.)

And to the admission of that testimony the defendant excepted, and his exception was allowed by the Court.

Q. Such as?

A. Grain, hemp, jute and straw. In fact, almost any nitrogenous material, that is, any material that contains nitrogen or vegetable matter; manure, for instance.

Q. When the silk waste is wet are ammonia fumes given off? A. They are.

Q. Will you state whether or not, and to what extent, ammonia fumes are poisonous? [203]

A. Why, ammonia is what is known or classified as an irritant poison; that is, as differentiated from systemic poison. The irritant poisons are those which attack the tissues of the body, and such material is not ordinarily poisonous unless it acts to an extent to result in permanent impairment of the tissues, so that under ordinary conditions, where a person is exposed to ammonia fumes, providing they are at liberty to make their escape, the inconvenience caused by the fumes, their irritating effect upon the lungs is such as to drive the person out of the room before any permanently injurious results take place. As an example of that, performing some experiments on gas masks sometime ago, we had a concentration of ammonia up to two per cent in the room where we were experimenting, and that is the maximum amount that can be withstood without serious discomfiture to the skin; that is, above that concentration it acts as a caustic and destroys the skin tissues,

(Deposition of Edward A. Barrier.)

or attacks it. In those cases the men who were experimenting simply left the chamber in which we were experimenting and no permanent injury resulted.

Q. Were they overcome?

A. They were not overcome. Of course if they had been forced to stay there and couldn't have made their escape, they probably would have been overcome in time.

Q. Assume the facts with regard to this shipment of Canton steam silk waste up to the time that it was unloaded on the dock, and assume that it had remained there some four or five days and had been wet down with a hose,—will you state whether or not, in your opinion, the ammonia fumes that would or could have escaped or been generated by the fermentation of the silk waste would have rendered it in any way dangerous to men handling it and loading it into cars?

Mr. KORTE.—Objected to on the ground that it is [204] not based upon any facts, and the further reason that it calls for a conclusion to be derived from certain proven facts which do not permit an expression of an opinion by a witness, but are rather for the conclusion of the jury or the Court, and the witness is therefore incompetent to give his opinion.

A. I cannot conceive how the amount of ammonia produced out in the open could possibly be sufficient to interfere with the handling of the material. In the first place, the amount that is produced in a

(Deposition of Edward A. Barrier.)

given period of time is quite limited. Furthermore, being exposed to the air out of doors, it would be quickly dissipated, so that the concentration of the gas in the immediate vicinity of the bales must be comparatively low, so low that it would not prevent the handling of the material.

Mr. LYETH.—You may inquire.

Cross-examination by Mr. KORTE.

Q. Mr. Barrier, if the facts actually showed that the men were overcome by the fumes you would change your opinion, wouldn't you? Answer that yes or no. A. If the facts showed that, yes.

Q. You stated, Mr. Barrier, in your opinion, that the heat which would be generated from the fermentation of the bales saturated with sea water would be limited in its amount. About how many degrees of heat do you think that the temperature would rise in the bales under the conditions which were stated to you?

A. I don't believe the temperature will rise above 150 degrees.

Q. Now if the temperature rose above that it would indicate that there was some other organic matter or property present which was producing the heat, wouldn't it? A. Yes. [205]

Q. And what could you lay that to—what substance?

A. It might be some foreign material which is subject to spontaneous ignition, such as oxidizable oils, for instance.

(Deposition of Edward A. Barrier.)

Redirect Examination by Mr. LYETH.

Q. Assume, in addition to the facts that I outlined in my hypothetical question that beans and rice were stowed in the same hold in the ship and that when the silk waste was unloaded on the wharf certain quantities of the beans and rice were sticking to the straw matting of the bales—will you state whether or not that would in any way increase the danger of spontaneous combustion or the heat that would be generated?

A. I think they would have practically no effect.

Q. (By Mr. KORTE.) This waste silk is classified as a nitrogenous matter, is it not, Mr. Barrier?

A. Yes, silk is a nitrogenous material.

Q. Beg pardon?

A. I say silk is a nitrogenous material, both raw and finished.

Q. (By Mr. LYETH.) What division of nitrogenous matter does it fall under?

A. What division?

Q. Yes. A. I don't know just what you mean.

Q. Is it a protein or nitro-cellulose?

A. Well, it is not either. Nitro-cellulose, of course, is a chemical produce, it is not a natural product, and becomes nitrogenous simply because part of the nitric acid group has been introduced into the material; but I should say that it belonged to neither of those classes. It certainly is not a nitro-cellulose, because it is not cellulose and it has none of the nitro group in it, and it contains no proteins.

(Deposition of Edward A. Barrier.)

Q. Are you familiar with garbage tankage?

A. Yes. [206]

Q. Does garbage tankage contain oils?

A. It does to some extent.

Q. Does the presence of oils in garbage tankage produce any tendency to spontaneous combustion?

A. It does; under some certain conditions spontaneous ignition of that material does occur, and that is undoubtedly due to combination of fermentation and the presence of oxidizable oils.

Q. Does the combustion, if it exists in that commodity, result from fermentation alone?

A. I should say not.

Q. What happens?

A. The fermentation undoubtedly is the primary cause that starts the action and raises the temperature to a point where the oxidation of the oils takes place quite rapidly. That is, it is possible that with the amount of oil present and the nature of the oil, that in itself, if the temperature were not previously raised, the fermentation would not result in spontaneous ignition.

Q. Then it is the combination—

A. It is the combination.

Q. —of fermentation and oxidation of the oils?

A. That is, oxidizable oils ore very much more subject to spontaneous ignition if the temperature is raised externally from some other cause.

Q. (By Mr. KORTE.) Those are vegetable oils in tankage, are they not?

A. Both vegetable and animal. You get animal oils in tankage too.

(Deposition of Edward A. Barrier.)

Q. But principally vegetable oils?

A. Well, it would depend largely upon the character of the tankage, naturally. If there is as much refuse in it as there is in some garbage there would be a large proportion of the animal oils. [207]

Q. (By Mr. LYETH.) What happens in the case of hay wet—or straw?

A. In the case of hay, which probably can ignite spontaneously, fermentation processes take place and develop a temperature which is high enough to convert the material into what is known as pyrophoric carbon—results in the formation of pyrophoric carbon, which is a form of carbon or charcoal produced at low temperature—at comfortably low temperature. We have similar action, or rather the formation of this same material, pyrophoric carbon, when a steam-pipe comes in contact with wood. There is no question but what experience has demonstrated that fires may result from contact of steam pipes with wood, and although the temperature of the pipe and the steam is much below that necessary to result in ignition.

Q. (By Mr. KORTE.) What temperature, Mr. Barrier?

A. Even with low temperature steam, 218 to 220 degrees, just three or four pounds pressure of steam is enough under favorable conditions to cause it. This pyrophoric carbon formed at low temperature has the property of absorbing oxygen of many times its own volume. Something like 150 to 200 times its own volume of oxygen can be absorbed and condensed in the pores of the material, and under those conditions spontaneous ignition occurs. So

(Deposition of Edward A. Barrier.)

that in the case of hay the fermentation is not the direct cause, but it does convert the material into a carbonaceous mass which absorbs oxygen and ignites spontaneously. The bacteria themselves could not exist at the temperature at which ignition takes place; they would die before that point is reached.

Q. Is it customary to put salt in hay in order to check any tendency to spontaneous combustion?

A. I wouldn't say it is customary; I don't think it is customary, but it is done. I have known of its being done for that purpose. It does have that result in retarding fermentation [208] and keeping of the hay.

Testimony of George E. Corey, for Plaintiff.

And to further prove the issue on the plaintiff's part, GEORGE E. COREY was called as a witness and gave the following testimony:

Q. (Mr. LYETH.) Mr. Corey, what is your business? A. I am a cargo surveyor.

Q. Are you what is commonly known as a marine surveyor?

A. Yes, but I handle cargoes only; not hulls.

Q. How long have you been cargo surveyor?

A. I have been at this work off and on since 1906, either working for the average adjusters, or surveying cargoes since 1906.

Q. By whom are you employed at the present time? A. At the present time?

Q. Yes.

A. I am employed by various people. Shall I enumerate them?

Q. Please.

A. I am surveyor for the Admiral Line; for the Osaka Shosen Kaisha.

(Testimony of George E. Corey.)

The COURT.—Here at this port?

A. Yes, at Tacoma; yes, sir.

Q. Proceed.

A. A. M. Gillespie, operating the Swain & Hoyt Fleet.

Q. Is the Osaka Shosen Kaisha the owner of the "Canada Maru"? A. Yes.

Q. Is that company associated with the Chicago, Milwaukee & St. Paul in the through transportation?

A. Yes, sir—the connection for the overland cargo.

Q. Were you subpoenaed to appear here, Mr. Corey? A. Yes, sir. [209]

Q. Did you see the cargo in the "Canada Maru" when she went ashore at Cape Flattery?

A. Not when she went ashore.

Q. After she went ashore?

A. I saw the cargo when it arrived at Tacoma.

Q. And what connection did you have with the cargo?

A. I was appointed as cargo surveyor by the ship owners.

Mr. KORTE.—You are speaking of the entire cargo?

The WITNESS.—Yes, sir, for the interest of all concerned.

Q. (Mr. LYETH.) And were you appointed general average surveyor by the ship owner?

A. Yes.

Q. Did you see the cargo of Canton steam silk waste that was damaged in the "Canada Maru"?

A. Are you speaking of any particular interest?

Q. I am speaking of the interest of the American

(Testimony of George E. Corey.)

Silk Spinning Company. A. Yes, sir.

Q. What did that cargo consist of?

A. One thousand bales covered by four bills of lading, stowed in No. 1 hold—lower hold.

Q. Were they of two grades?

A. I don't know.

Q. Will you relate when the vessel arrived here and what she did?

A. Arrived in Tacoma, you mean?

Q. Yes, arrived in Tacoma.

A. She arrived in Tacoma the 7th day of August, 1918, I think that was the year. She went immediately to the Todd Drydock in Tacoma, or at Tacoma—and we put her on the ways, or on the drydock rather, and she was off, after patching her up, she was off on the 10th day of August, if my recollection serves me right [210] we started to discharge the cargo at 8:30 A. M. on August 10th, and we continued to discharge it until about 11:30 of the 10th, and the vessel began to take water so fast that the hull surveyors were afraid that she might sink at the dock and they ordered her back on the drydock, and she stayed on the dock all day of the 11th and she arrived back at the Milwaukee dock, I think about 9:00 P. M. of the 11th,

Q. About 9:00 P. M.? A. Yes.

Q. And then?

A. And she laid there all night and began to discharge about 8:00 A. M. of the 12th; that is my recollection.

Q. Did you see this Canton steam silk waste consigned to the American Silk Spinning Company?

A. Yes.

Q. Where did you see it?

(Testimony of George E. Corey.)

A. In the No. 1 lower hold.

Q. Did you see it on the dock?

A. Oh, yes, yes.

Q. Did you examine it? A. Yes.

Q. When did you examine it, approximately?

A. You want the date?

Q. Well, approximately.

A. It was along—I can't tell you the date we began to discharge that, but I think that stuff began to come out on the 12th and I had—I examined it from the time they started to discharge until they put it in the cars, at various times.

Q. Will you describe its condition?

A. As it was on the dock?

Q. Of the silk waste. [211]

A. The silk waste was taken out of the ship and placed on a platform between two sheds. There was an oil-shed and a freight-shed. We stood the bales on end so that they would drain and those bales were covered over with rice and beans and tea and various stuff; commodities that had broken loose in the hold. After we stowed them on deck, or on the dock, rather, they were warm; after they had laid there a little while, as all cargo does—all cargo that is wet will get warm, of all descriptions—then I turned the hose on it.

Q. Did you afterwards see it loaded in refrigerator-cars? A. Sir?

Q. Did you afterwards see it loaded on the refrigerator-cars?

A. Yes; I saw them loading at times. I was not there all of the time.

Q. Well, there were refrigerator-cars brought on the dock?

(Testimony of George E. Corey.)

A. They were brought down to the dock in the neighborhood of the waste silk.

Q. And did you see the silk in the refrigerator cars? A. Yes, sir.

Q. What was its condition; did you examine it?

A. The condition when I saw it was in the same condition as it lay on the dock,—warm.

Q. Was it heating to any alarming degree?

A. No, sir.

Q. Was it heating any more than any other cargo that has been wet that you have had experience with?

Mr. KORTE.—I object to that method of comparison. Let him tell how it was heating, as far as it can be done. We do not know how these other cargoes were being heating or what kinds of cargoes they were.

Q. Will you state, Mr. Corey, what experience you have had with [212] wet cargoes? Give the Court some idea of what cargoes you had to do with.

A. It is rather hard to do that. I have been in this work so long and I have been in a great many cases of wreck. For instance, I was on the "Shinyo Maru" that arrived about a year afterwards, and she was in the same condition. We had a great many hundreds of bales of burlap discharged from her and they were in a very heated condition—more heated condition than the waste silk.

Q. Was that forwarded?

A. No, that was sold.

Q. Was there any danger, in your estimation, of spontaneous combustion?

A. No, sir, none whatever.

(Testimony of George E. Corey.)

Mr. KORTE.—I don't think that has anything to do with showing how hot this was—what burlap might do or how it might get hot.

The COURT.—We are concerned with waste silk in this case.

Q. (Mr. LYETH.) Did this waste silk of the American Silk Spinning Company heat as much as burlap?

A. I would say it did not; no, sir; burlap heats about as much as any commodity I ever dealt with.

Q. Does it heat as much as beans or rice that has been wet? A. Well, I would say so.

Q. From your experience in handling damaged cargoes, Mr. Corey, will you tell the Court whether or not, in your opinion, the damaged silk waste of the American Silk Spinning Company was in any way dangerous to transport across the continent in refrigerator-cars?

A. (Turning to the Court.) Your Honor; if it had been my silk I [213] would have sent it forward immediately. As a matter of fact, I ordered the stuff in the cars—recommended it to go forward.

Q. Did you hear anything about its refusal—about the railroad refusing to forward it?

A. Yes.

Q. Did you see or talk with Mr. Wilkinson?

A. I talked with the gentleman whom I have been told since his name was Wilkinson—I didn't know at the time what his name was.

Q. Will you state what happened?

A. I was standing in the vicinity of the silk and this gentleman was standing about the same distance from me that you are standing from me, and

(Testimony of George E. Corey.)

he walked up to me and he said: "That silk can't go." And I says: "Why?" "Well," he said, "it might burn up the cars—it might burn up the depot; it might burn up the railroad property." And I says, "Mister," I said, "the Germans might come over here and shoot us all up, but they are not going to do it, and neither will that silk burn up the cars, and I am very much surprised to have you hold that silk here."

Q. Did you feel the bales of silk?

A. Yes, sir.

Q. Did you feel them on the day that you had the conversation with Mr. Wilkinson?

A. Yes.

Q. Please describe their condition.

A. The silk was warm; about as warm as cotton goods would get—piece goods. Very often we have piece goods, bolts of cotton that get warm; and the silk was just about the warmth that cotton goods would show in a case of this kind.

Q. You mean by that, those manufactured cotton goods?

A. Yes, manufactured in bolts. [214]

Q. In the fabric?

A. Yes; but not such a degree of heat as burlap will hold.

Q. Had the bales been washed down at intervals when you had this conversation with Mr. Wilkinson? A. Yes; we had the hose on it.

Q. Had the beans and stuff been washed off?

A. Yes, some of it—we could not get it all off.

Q. Were there any fumes coming off?

A. No, sir, not to my knowledge.

Q. Any ammonia fumes?

(Testimony of George E. Corey.)

A. No, sir. Waste silk will show ammonia fumes if it is confined, if it is wet.

Q. Did the men in loading the bales on the refrigerator-cars experience any difficulty with ammonia?

A. No, sir, not to my knowledge.

Q. Did you hear any difficulty of that kind about that? A. Not to my knowledge, no, sir.

Q. How many times were you around, Mr. Corey?

A. Until the cargo was discharged and for months afterwards.

Q. Were you there every day while the cargo was being discharged?

A. While being discharged?

Q. Yes.

A. Oh, yes, I was there night and day.

Q. Night and day? A. Yes.

Q. So that you had plenty of opportunity to see this cargo all of the time? A. Yes.

Q. Did it at any time show any signs of undue heating so as to cause alarm from spontaneous combustion? A. No, sir. [215]

Q. In your mind?

A. No, sir; not in my mind; none whatever.

Q. Do you know whether this silk was unloaded from refrigerator-cars after you had your conversation with Wilkinson?

A. The silk was unloaded, but at that time it had been turned over to the underwriters and I dropped that part of the work.

Q. You did not have anything to do with that?

A. I had lots of other work to do, and Mr. Taylor took charge of that. In the meantime, I had

(Testimony of George E. Corey.)

recommended the silk to go forward, as the cargo surveyor.

Q. Or as the general average surveyor?

A. Yes.

Q. Do you know whether or not or what was done with it after it was unloaded from the refrigerator-cars?

A. Yes, sir; the silk eventually was taken to the Pacific Oil Mills.

Q. Was it loaded again in cars?

A. It was loaded in cars; I think boxcars.

Q. Loaded in boxcars? A. Yes.

Q. Do you remember the date?

A. No, I do not. It was some time afterwards, though.

Cross-examination by Mr. KORTE.

Q. You, of course, when the ship first came in, went on board of her? A. Yes, sir.

Q. And you went down into the hatches?

A. No, sir, it was too wet.

Q. Why didn't you go down into the hatch where the silk was located? A. Too wet. [216]

Q. Well, how did the man get it out of the hatch?

A. How did they?

Q. How did the men get it out of the hatch?

A. Well, in the ordinary manner.

Q. How—what way?

A. In the ordinary manner with the slings.

Q. What do you call the ordinary manner?

A. With the slings.

Q. Well, how did they get the bales into the slings?

A. The hold was submerged. This silk was practically submerged. It might have been a foot

(Testimony of George E. Corey.)

out, and they worked down from bale to bale, and we had pumps on board the ship sucking out the water.

Q. Then there were men down in the hatches?

A. Yes.

Q. But you said you did not go down?

A. No, sir.

Q. Why didn't you go down?

A. I had no reason to go down.

Q. Why; were you not looking over the cargo?

A. Yes; I could see all I wanted to see from the top side.

Q. And it looked pretty bad to you?

A. It looked very bad.

Q. And as the men were bringing it out of the hold were you there constantly? A. No, sir.

Q. Or off and on?

A. I was there from time to time in different parts.

Q. So that you know what was going on pretty near, in the relation to bringing this stuff out of the hold? A. Yes.

Q. Of course it took some time to get it out; it was not brought out in one day? [217]

A. I don't remember. It might have been taken out in one day, but I think they were two days getting that hold discharged—there was other stuff in that compartment.

Q. And as the men were taking it out you would keep the water up as far as possible so that there would not be too many bales exposed at one time?

A. I don't know about that.

Q. Well, how much do you know about this—you said that you were around there? A. Yes.

(Testimony of George E. Corey.)

Q. Then you did not pay any attention to it at all, or to them getting those bales out of the hold?

A. They took the bales out of the holds by means of slings—that is the stevedore's business and not mine.

Q. I understand that, but I am trying to get at your knowledge; you said you were around the ship all the time and you knew what was going on?

A. Yes.

Q. Now, did you see them bring the bales out of the hold at any time?

A. I saw them taking the bales out of the hold by means of the slings and the nets.

Q. And there were men down in the hold?

A. Yes.

Q. And you were there, were you, when they brought those men out suffocated and overcome by the fumes? A. On this ship?

Q. In taking the bales out of the ship?

A. No, sir, I never knew anything about that. That is news to me.

Q. Were you there when the men were unloading the two cars that were loaded on this dock, of waste silk; were you there when they unloaded them? [218]

A. You mean the refrigerator-cars?

Q. Yes. A. No, sir, I was not.

Q. Were you there when they were loading them?

A. Yes, sir.

Q. But not when they were unloading them?

A. No, sir.

Q. Nor when they were loading them up in the boxcars?

(Testimony of George E. Corey.)

A. I may have been in the vicinity, but I didn't see them unloading the silk. Mr. Taylor was in charge of that at the time and I had no more to do with it.

Q. But, at any rate, when they did put it on the dock, they kept it wetted down constantly?

A. Yes.

Q. And when the silk was in those two refrigerator-cars, pending the determination of whether it should go on or not, they kept it wetted down in there, didn't they?

A. I did not; no, sir.

Q. I did not ask you whether you did—but you said you were around there. A. Yes, I was.

Q. Well, did you see that they were wetting it, or see them wetting it?

A. I don't remember whether they wetted those cars down or not.

Q. But they kept them wetted down out on the—

A. —on the dock.

Q. And they did that, of course, to keep the heat down?

A. I ordered the stevedores to keep that stuff wet.

Q. And that would have to be done if it went on East to Providence—constant wetting down, to keep it from heating?

A. I am not a silk man. [219]

Q. How did you say that it ought to be shipped then—you say that you are a cargo surveyor?

A. Yes.

(Testimony of George E. Corey.)

Q. And what do you mean by that?

A. I don't understand you.

Q. What do you mean by a cargo surveyor, that title which you said you had?

A. You want me to describe what I do?

Q. I want you to describe yourself—you said you are a cargo surveyor and I don't know what it means; do you?

A. You are a lawyer and you ought to know as a lawyer.

Q. Perhaps I should, but let us get the benefit of your knowledge, which seems to be considerable —what do you mean by cargo surveyor?

A. In the case of a ship going ashore—I am speaking of this case here—

Q. Yes.

A. —it is the practice to have a man to stand by and make recommendations in regard to the sound and damaged cargo; and that is what I was there for. In my opinion, if the stuff is in shape to go forward, and will bear the freight charges, and from my knowledge of the work I think it will stand the transportation, and there is no danger of damage, I order the stuff forwarded.

Q. Then it is your duty to determine how a given cargo will ride without damaging itself or damaging other property?

A. Not wholly; no, sir. I had to consult with the underwriters and the man who owns it.

Q. Then your opinion would not be worth much as to whether this cargo was fit to ship across the

(Testimony of George E. Corey.)

continent? A. I think it would.

Q. Well, then, how *would ship,* or did you expect to ship this cargo to Providence, Rhode Island? [220]

A. Well, this cargo—Mr. Taylor arranged to have this cargo—

Q. I don't want Mr. Taylor's arrangements; I am asking you for your personal knowledge on the subject, as to how you expected to ship that cargo to Providence, Rhode Island.

A. You want to put me in the place of the silk owner?

Q. I want to put you in the place of the cargo surveyor.

A. If I had owned that silk—

Mr. KORTE.—If your Honor please, I do not care to have the man arguing with me.

Q. I am asking you what you would do.

A. I would put that silk in the car and I would have kept it wet at stations, if it was possible; then I would have sent a man along with it, or perhaps two men.

Q. For what purpose?

A. For wetting it down, if the railroad company could give me the water.

Q. If you didn't get the water, what then?

A. Then I would have to let it go through as we usually do. There was no danger of burning up anything.

Q. You think it would not burn up at all if it went through without wetting?

(Testimony of George E. Corey.)

A. Not in my opinion.

Q. Of course, you are not experienced at all in spontaneous combustion, are you? A. No.

Q. Did you have any occasion to come in contact with it ever? A. I never saw any.

Q. What is spontaneous combustion?

A. I don't know, sir; I can't say; I am not technical.

Q. Then when you say this article was not subject to spontaneous combustion, you didn't know what you were talking about?

A. Not spontaneous combustion. [221]

Q. It is a subject that you don't know anything about—very well; anyway, let us get back to the cargo. There was in the hold of this ship beans and rice and I don't know what all, was there not?

A. Well, you have a cargo plan there.

Q. All right; I will show you the cargo plan and I will ask you to state whether or not that represents the "Canada Maru" as it came in, Mr. Corey, to Seattle, with the various cargoes located in the hold of the ship?

A. It is three years ago, you know.

Q. Here is the plan (showing plan to witness).

A. Yes, sir. This is the plan of the "Canada Maru," Voyage 32, eastbound.

Q. That will be Defendant's Exhibit No. 19; that shows the plan of the ship? A. Yes, sir.

And thereupon, the defendant offered in evidence a diagram or plan of the ship, which was received in evidence and marked "Defendant's Exhibit No.

(Testimony of George E. Corey.)

19," and said exhibit is transmitted to the Circuit Court of Appeals with all of the other original exhibits.

And thereupon, the defendant offered in evidence a copy of the ship's log. The same was received in evidence and marked "Defendant's Exhibit No. 20," and the same is transmitted to the Circuit Court of Appeals with all of the other original exhibits.

Q. Now, there was in that ship rice, wool, oil, raw silk waste, sugar, tobacco, tea, beans and various cargoes?

A. Was there tea in the No. 1 hold?

Q. Well, it was in the ship's hold.

A. In No. 2 was the tea. [222]

Q. And the water got into all of the hatches?

A. No, sir.

Q. In what ones?

A. The No. 1, No. 2 and No. 3. There was about six or eight feet of water in the No. 3 and I should judge sixteen feet in No. 2 and perhaps eighteen or twenty feet in No. 1—it came up to the 'tween-decks, to the bulkhead between.

Q. And the No. 1 and the No. 2 would be here (pointing)? A. Yes, sir.

Q. I will mark that.

A. It is marked there—and here is the bulkhead.

Q. And the silk waste involved here was contained in hatch No. 1?

A. Yes, sir; that is my recollection.

Q. 948 bales?

(Testimony of George E. Corey.)

A. Yes, sir; or there might have been some in other places, but the bulk of the shipment was in No. 1.

Q. And where was the hole stove in the ship?

A. It was right along in the forward end near hatch No. 1.

Q. Near the rice and the other commodities, and the tea?

A. She was holed in various places under No. 1 and No. 2—the rivets were gone.

Q. What I want to get at is, that the rice and the tea and the beans that came out of these hatches were also wholly saturated by the seawater.

A. Yes, in No. 1 and No. 2, up to the 'tween-decks.

Q. So much so that you dumped them into the Sound? A. We dumped some tea eventually.

Q. Well, didn't you dump beans?

A. No; I think they were sold.

Q. And the rice?

A. They were put on scows and sold. [223]

Q. Well, none of it was sent forward?

A. Not any of the watersoaked stuff, no, sir—it was unidentifiable—we didn't know whose it was.

Q. You made the statement that the men did not complain while loading?

A. Not to my knowledge.

Q. And when you spoke of the loading of the cars, did you have in mind the refrigerator-cars?

A. Yes, sir; two or three refrigerator-cars; I

(Testimony of George E. Corey.)

don't remember whether it was two or three cars.

Q. The record shows that it was two,—anyway, it was the refrigerator-cars. A. Yes.

Q. Of course, at that time you took the bales, the first ones that came out of the hold, and they had been sprinkled down and wetted down and cooled when they were loaded into the refrigerator-cars, as much as you could cool them?

A. They were cooled and washed. Silk of this nature won't flame.

Q. How do you know it won't flame?

A. I have tried it with a match.

Q. You mean that you can't light it and get a blaze? A. No, sir.

Q. But it will burn? A. It will char.

Q. That is what I mean by burning—you are not trying to become an expert on spontaneous combustion, are you—you do not know what causes it, or what causes ignition at all, or anything about it, and when you said that you recommended this to go forward, you, by merely looking at it, thought it ought to ride?

A. The same as any other cargo of a like nature.

Q. What other cargo which would be of a like nature, do you have in mind? [224]

A. I spoke of cotton goods, for one thing.

Q. You think that cotton is of a like nature—that the component parts of cotton are the same as the component parts of silk?

A. I am not a chemist, I don't know.

Q. It is just your ordinary common knowledge;

(Testimony of George E. Corey.)

you are estimating or assuming that cotton is the same as raw waste silk?

A. I mean cotton as an illustration only.

Q. And while you know that cotton will heat, you say it will not burn—you have never known it to burn?

A. I never knew of a case of spontaneous combustion occurring in a damaged cargo by being wet like this.

Q. Did you ever hear of a hay stack burning up?

A. Yes.

Q. Have you ever lived on a farm?

A. No, sir, not on a farm—I have been to sea a long time.

Q. This stuff is a good deal like the fibre of the hay? A. I don't know.

Q. You don't know anything about that—well, that is all.

Redirect Examination.

Mr. LYETH.—Just one question.

Q. Some of the cargo was jettisoned to lighten the ship? A. Yes.

Q. To get her off?

A. Yes; there was quite a lot of stuff jettisoned.

Q. And were the beans and the rice, which you stated were unidentifiable, in the No. 1 hold?

A. It was identifiable only in a general way by the bills of lading, but the marks were gone and the bags burst by the swelling of the contents.

Q. And they were floating around?

A. Oh yes; we took it out in buckets. As a

(Testimony of George E. Corey.)

matter of fact, when [225] we had the ship on the ways the first time she was so heavy we could not lift her with the weight of the water, and the beans and rice from those broken packages were running out on the decks, and many hundreds of pounds ran out through the broken places in the ship's bottom.

Testimony of Frank G. Taylor, for Plaintiff (Recalled).

And thereupon, to further prove the issue on the plaintiff's part, FRANK G. TAYLOR was recalled and gave testimony as follows:

Q. (Mr. LYETH.) Mr. Taylor, on August 12th when you made the arrangement with Mr. Cheney regarding the forwarding of this silk, did Mr. Cheney say anything to you about the time it would take to forward the silk by silk train service?

A. I asked Mr. Cheney how long it would take for the silk to get to Providence by silk train service and he said six days.

Q. (Mr. KORTE.) Of course, you did not know and do not know yourself how long it would take?

A. I did not.

Q. As to whether that was the schedule time or not? A. I did not.

Q. You were merely inquiring for information of him as to the probable time it would take?

A. Yes.

Deposition of Russell Weeks Hook, for Plaintiff.

And to further prove the issue on the plaintiff's part, the deposition of RUSSELL WEEKS HOOK was introduced and read in evidence in connection with the following stipulations:

IT IS STIPULATED that the copy of the insurance policy referred [226] to in the pleadings and the copies of the receipts of moneys received thereunder, furnished by the plaintiff to the attorney for the defendant, may be used on the trial as evidence in lieu of the original policy and receipts, subject to objections other than that they are not the originals.

It is stipulated that No. 1 Canton steam silk waste and No. 2 Canton steam waste are recognized standard grades in the handling and marketing of waste silk, and that the samples of each of said grades of Canton steam waste furnished by the plaintiff to Mr. Hook and Arthur D. Little, Inc., and to the defendant are practically identical with the commodities the subject of this suit.

It is further stipulated that uncertified copies of any tariffs, rules and regulations, classifications and rules of the Interstate Commerce Commission governing freight or commodities for shipment such as are involved in this suit may be used upon the trial in evidence in lieu of certified copies, subject to objection other than that the same are not certified.

(By Mr. LYETH.)

Q. What is your full name?

(Deposition of Russell Weeks Hook.)

A. Russell Weeks Hook.

Q. What is your occupation, Mr. Hook?

A. Chemist.

Q. Will you state briefly what your training and experience has been as a chemist?

A. I am a graduate of the Chemistry and Dyeing Department of the Lowell Textile School, Lowell, Mass.; graduated in the year 1905 and in the following fall I went back as instructor in the Chemistry and Dyeing Department of the same school. I remained there for approximately three years. At the end of that period I was connected with a dyestuff concern, engaged in selling and manufacture [227] of dyestuffs and various chemicals used in the textile industry. In the year 1908 I became associated with Arthur D. Little, Incorporated, and have been with him up to the present time, covering a period, I believe, of about twelve years. My work with Arthur D. Little, Incorporated, has been very broad, covering all fields of analytical work, and I have devoted a great deal of time to research work, pertaining specially to the textile industry. At the present time I am in charge of the textile department for Arthur D. Little, Incorporated, and a great proportion of my work is outside work in the plants and of a practical nature.

Q. Are the plants you refer to textile plants?

A. Textile plants.

Q. In New England?

A. Well, chiefly in New England; yes.

(Deposition of Russell Weeks Hook.)

Q. Have you, Mr. Hook, at my request, conducted any experiments with Canton steam waste of the grades known as No. 1 and No. 2? A. I have.

Q. Especially with respect to the question whether or not it is liable to spontaneous combustion? A. I have.

Q. Where did you obtain the samples of No. 1 and No. 2 Canton waste with which you conducted the experiments?

A. From the American Silk Spinning Company of Providence, Rhode Island.

Q. The plaintiff in this case. Do you know what the chemical analysis of silk waste is?

A. I have made a chemical analysis of two grades of Canton steam silk waste designated as grade No. 1 and grade No. 2. The results of my analysis are as follows: No. 1 silk: Boil-off test: Loss to 1 per cent neutral soap [228] solution at 203 degrees Fahrenheit, 34.5 per cent.

For No. 2 silk,—

Q. Just let me interrupt there. Would you explain what that means, Mr. Hook?

A. This boil-off test is a test similar that they make in the mills for removing the silk gum, and the figures shown under this determination in my analysis represent the approximate amount of natural impurities of silk gum present in these two grades of waste silk.

Q. And No. 1 is what? A. 34.5 per cent.

Q. And No. 2?

A. 41.2 per cent. The next determination: Ether

(Deposition of Russell Weeks Hook.)

extract: Oil, waxy or fatty matter; that is 1 per cent for the No. 1 silk, sixty-five one-hundredths of one per cent for the No. 2 silk. Either extract shows the amount of oily, waxy or fatty matter present in those two grades of silk.

Raw silk or silk waste has an approximate composition of two-thirds actual silk fiber and one-third of silk gum. In addition to these, there is present in all raw silk small amounts of oily, waxy and fatty matter, as well as pigmentary matter or natural coloring matter. From the above analysis No. 2 silk contains a somewhat greater percentage of silk gum, namely, 6.7 per cent. No. 2 silk—

Q. That is, 6.7 per cent more gum than No. 1 contains?

A. More than No. 1. No. 2 silk was found considerably darker in shade than No. 1 silk.

Q. Will you describe, Mr. Hook, exactly what experiments you conducted, giving in some detail exactly what you did and describing your apparatus?

A. In starting out my experiment work with these two grades of [229] silk I first procured sufficient quantity of ocean water. This ocean water was procured at a point well down Boston Harbor to avoid any chances of pollution due to industrial waste or sewage. The first experiments were more of preliminary tests for the purpose of determining just how these No. 1 and No. 2 silk wastes acted when wet with sea water and allowed to stand for a considerable period of time under normal room

(Deposition of Russell Weeks Hook.)

temperatures, which, at the time these tests were conducted, ranged from 65° to 75° Fahrenheit. I found upon wetting the two grades of silk waste with ocean water that at the end of approximately 24 hours fermentation set in and considerable amount of ammonia gas was evolved by the fermenting silks. Tests were then conducted with the two silk wastes by first wetting them with ocean water and placing them in an insulated wooden chest with chemical thermometers. The chest referred to in these tests is nothing more than a small-sized ice chest properly insulated and lined with zinc, the chest having the approximate inside dimensions, eighteen inches wide, two feet deep, two and a half feet to three feet long, provided with a close-fitting and insulated cover.

Q. How did you place the thermometer?

A. The thermometer was embedded in the silk so that its bulb did not reach below the bottom of the silk. That is, at all times the bulb of the thermometer was embedded in approximately the center of the silk waste packed in the chest.

Q. About how much silk waste did you put in the chest?

A. Approximately seven to ten pounds of silk waste were used in these tests.

Q. On what did you place the silk waste?

A. In our first test, conducted in the so-called insulated chest, the silk was supported on wooden grids, leaving an air space under the silk of about four to five inches. The chest was [230] closed

(Deposition of Russell Weeks Hook.)

and the date the test was started was recorded, and also temperatures on various dates. And the result of the temperatures recorded in the test conducted with No. 1 Canton steam silk waste wet with ocean water is as follows:

This test was started October 8th, 1920. The room temperature at the time the test was started was 64.4° Farhrenheit. The temperature of the silk in the chest was 66.2° Fahrenheit. The room temperature is the temperature of the room in which the chest was located during the tests.

Q. In other words, you had two thermometers—is that right? A. Two thermometers.

Q. One inside the silk and one in the room?

A. In the room.

Q. Where the chest was located?

A. That is it. The result of the test was as follows:

Date.	Temperature of Room. Degrees Fahr.	Temperature of Silk in Chest. Degrees Fahr.	Increase of Temperature of Silk over Room Temperature. Degrees Fahr.
10/ 8/20	64.4	66.2	1.8
10/ 9/20	66.2	86.0	19.8
10/11/20	64.4	71.6	7.2
10/13/20	60.8	68.0	7.2
10/14/20	63.5	67.1	3.6
10/15/20	66.2	69.8	3.6
10/16/20	66.2	70.7	4.5
10/18/20	63.5	68.0	4.5
10/21/20	71.6	75.2	3.6
10/22/20	66.2	73.4	7.2
10/25/20	63.5	67.1	3.6

(Deposition of Russell Weeks Hook.)

This test covered a period from October 8th to October 23d, and the greatest difference in temperature recorded between the temperature of the silk in the chest and the room temperature was on October 9, when the silk in the chest showed a temperature of 86° Fahrenheit and the room temperature this date was 66° Fahrenheit, showing increase in temperature of silk over room temperature of 20° Fahrenheit. [231]

The next test conducted was with No. 2 silk waste. This test was conducted the same as test previously described with No. 1 silk waste. The results of the test are as follows:

Date	Time	Temp. of Room Degs. Fahr.	Temp of Silk in Chest. Degs. Fahr.	Increase in Temp. of Silk over Room Temp. Degs. Fahr.
11/17/20	11.30 A. M.	73.4	71.6	1.8 below room
"	4.00 P. M.	71.6	73.4	1.8 above
11/18/20	8.30 A. M.	69.8	93.2	23.4
"	9.45 A. M.	68.9	93.2	24.3
"	10.25 A. M.	69.8	95.0	25.2
"	11.00 A. M.	69.8	100.4	30.6
"	11.45 A. M.	69.8	102.2	32.4
"	12.30 P. M.	70.7	100.4	29.7
"	12.55 P. M.	69.8	104.0	34.2
"	1.30 P. M.	69.8	105.8	36.0
"	2.00 P. M.	69.8	104.0	34.2
"	2.30 P. M.	71.6	104.0	32.4

(Deposition of Russell Weeks Hook.)

Date	Time	Temp. of Room Degs. Fahr.	Temp. of Silk in Chest. Degs. Fahr.	Increase in Temp. of Silk over Room Temp. Degs. Fahr.
"	3.20 P. M.	71.6	102.2	30.6
"	4.15 P. M.	71.6	104.0	32.4
"	5.00 P. M.	73.4	107.6	34.2
11/19/20	9.00 A. M.	69.8	95.0	25.2
11/20/20	9.00 A. M.	69.8	84.2	14.4
11/22/20	9.00 A. M.	62.6	71.6	9.0
11/23/20	9.00 A. M.	68.0	77.0	9.0
11/24/20	9.00 A. M.	66.2	77.0	10.8
11/26/20	9.00 A. M.	68.0	73.4	5.4
11/27/20	9.00 A. M.	69.8	80.6	10.8
11/29/20	9.00 A. M.	64.4	77.0	12.6

This test was started on November 17, 1920, 11.30 A. M., and was concluded on November 29, 9 A. M. The greatest difference in temperature of the silk over room temperature was recorded at 1:30 P. M. on the 18th of November, the room temperature at this time and date being 69.8 Fahrenheit. The temperature of the silk in the chest at this time and date was 105.8° Fahrenheit, showing the temperature of the silk exceeded the temperature of the room by 36° Fahrenheit.

Further tests were conducted with approximately seven to ten pound samples of silk wastes 1 and 2. These tests were also conducted in the above described insulated chests. They were carried out as follows: The silk was first wet with [232] ocean water, placed in the insulated chests, allowed

(Deposition of Russell Weeks Hook.)

to ferment until no further rise in temperature of the silk in the chest was noted. The silk was then heated by the means of introducing artificial heat into the insulated chest. This was carried out by introducing an electric bulb into the bottom of the chest underneath the silk, which was supported on grids. The electric bulb was attached to the ordinary electric current supplied in our building. The wires connecting the light in the chest came through a small opening in the bottom of the chest having a diameter of approximately one inch. At the top of the chest, approximately one inch below the cover, there was another hole leading out of the back of the chest, having a diameter of approximately one inch. These two holes were both open during these tests. The wires of the electric bulb were led through the lower hole. A 100-watt and 110-volt nitrogen-filled bulb was used in these tests. The result of the test was, the temperature both of the room and of the heated No. 1 silk waste in the chest were as follows:

Date	Temperature of Room. Degs. Fahr.	Temperature of Silk in Chest. Degs. Fahr.
11/1/20	59.0	59.0
11/2/20	69.8	159.8
11/3/20	61.7	231.8
11/5/20	66.2	240.8
11/6/20	62.6	242.6
11/8/20	55.4	237.2
11/9/20	64.4	244.4
11/10/20	66.2	249.8

(Deposition of Russell Weeks Hook.)

Date	Temperature of Room. Degs. Fahr.	Temperature of Silk in Chest. Degs. Fahr.
11/11/20	62.6	240.8
11/12/20	73.4	253.4
11/13/20	66.2	253.4

This test was started on November 1, 1920, and concluded on November 13, 1920. The silk in this test reached a maximum temperature of 253.4° Fahrenheit.

Q. Have you the actual silk that you used in the first test which you conducted with No. 1 silk waste without any artificial heat? [233]

A. I believe I have. (Examining samples.) This is No. 1.

Mr. LYETH.—I offer that in evidence.

Sample of No. 1 Canton silk waste used in first test offered and received in evidence and marked "Plaintiff's Exhibit 10, Deposition of R. W. Hook. Frank H. Burt, Notary Public." Said exhibit is transmitted to the Circuit Court of Appeals with all of the other original exhibits.

Q. Did you use the silk marked "Plaintiff's Exhibit No. 10" in the first test which you have described? A. I did.

Q. And did you use the same silk in the last test which you have described, with the bulb?

A. I did.

Mr. KORTE.—That is, the same kind of silk; he didn't use the same exhibit?

Mr. LYETH.—No, the same silk.

Mr. KORTE.—Do you mean the same exhibit?

(Deposition of Russell Weeks Hook.)

The WITNESS.—Yes.

Q. In other words, you used this Plaintiff's Exhibit No. 10 in your first test with sea water?

A. I did.

Q. Running from October 10—

A. October 8th to October 23d.

Q. And when you observed no further rise in temperature you then continued the experiment by inserting the artificial heat by means of the bulb with the same silk? A. The same silk.

Q. Did you follow the same method with respect to the No. 2 waste?

A. The same method was followed with No. 2 waste.

Q. Have you the sample of the No. 2 waste with which you conducted the experiment?

A. I have. (Producing sample.)

Mr. LYETH.—I offer that in evidence.

Sample of No. 2 waste used in the above described test offered and received in evidence and marked "Plaintiff's Exhibit 11. Deposition of R. W. Hook. Frank H. Burt, Notary Public." Said exhibit is transmitted to the Circuit Court of Appeals with all of the other original exhibits. [234]

Q. After you had observed no further rise in the temperature of the No. 2 Canton steam waste, you introduced the artificial heat by means of an electric bulb in a similar manner that you did with No. 1?

A. I did.

Q. And will you now give the results of the experiment with the artificial heat?

(Deposition of Russell Weeks Hook.)

A. The results of these tests are as follows:

Date	Temperature of Room. Degs. Fahr.	Temperature of Silk in Chest. Degs. Fahr.
11/29/20	64.4	77.
11/29/20	68.0	122.0
11/30/20	68.0	149.0
12/1/20	75.2	131.0
12/2/20	64.4	127.4
12/3/20	55.4	181.2
12/4/20	75.2	190.4
12/6/20	68.9	201.2

This test covered a period of time from the 29th day of November, 1920, to the 6th day of December. The silk in the chest reached a temperature of 201.2° Fahrenheit on the 6th day of December.

Q. On any of these four tests that you conducted did you observe any evidence or tendency in the silk waste to ignite from spontaneous combustion?

A. I did not.

Q. Describe exactly what happened to the silk.

A. I noted in conducting these tests that after the silk had been wet with ocean water, placed in the insulated chest and allowed to remain in the chest, at the end of a period of approximately twenty-four hours fermentation started in and a large amount of ammonia gas was evolved. There was a slight heating of the silk. As the tests continued, the temperature decreased. This decrease in temperature was only noted in the case where [235] the silks were not heated artificially. The strong odor of ammonia persisted throughout the

(Deposition of Russell Weeks Hook.)

duration of all the tests. During the latter part of the tests a very disagreeable odor of a putrefying character was quite noticeable.

Q. Was that after you had introduced the artificial heat?

A. That was before artificial heat was introduced. That was when the silks were allowed to ferment in the chest without the addition of any outside heat.

Q. Now, then, what happened after you had introduced the artificial heat?

A. After artificial heat had been introduced in these tests the odor of ammonia was still present but not to such a marked degree. The odor of putrefying matter disappeared to a considerable extent, and, in fact, at the end of the tests there was practically no odor of a putrefying nature.

Q. What did you observe with respect to the silk that was nearest to the electric bulb?

A. On examining samples of silk in the chest that had been heated by means of electric bulb, it was found, after the tests had been running for several days, that the silk nearest the bulb in the chest in many cases had been charred.

Q. What sort of grids did you have under the silk?

Mr. KORTE.—What?

Mr. LYETH.—Grids; slats.

A. When the tests were first started we attempted to use wooden grids for supporting the silk in the chest, and at the time these wooden grids were used an electric hot plate was used for heating in-

(Deposition of Russell Weeks Hook.)

stead of an electric bulb; but that was found to produce too great a heat for these experiments, and subsequent tests were conducted with electric bulb.

Q. What happened to the wooden grids? [236]

A. It was found on examining the wooden grids that they had become badly charred, so much so that two of the grids directly about the electric hot plate had charred through and broken.

Q. Had the silk taken fire at any time while this hot plate or the electric bulb was underneath?

A. The silk had not taken fire.

Q. (By Mr. KORTE.) Could you give the capacity of that hot plate?

A. At the present time I am unable to give you the amount of heat generated by that electric hot plate. Possibly I could get that figure for you.

Mr. KORTE.—Oh, just approximately.

Mr. LYETH.—Just approximately.

Mr. KORTE.—That is all we care for.

A. As an approximate estimation of the heat developed by the hot plate, I would state that it was between 500° to 700° Fahrenheit.

Q. (By Mr. LYETH.) Did the silk nearest the hot plate and the electric bulb disintegrate?

A. Disintegrate?

Q. The disintegrated or charred silk is shown on Exhibit 10 by the orange red color? A. Yes.

Q. And on Exhibit 11 the same way? A. Yes.

Q. This is what you referred to by the disintegration or charring? A. Yes.

Q. This disintegration or charring took place

(Deposition of Russell Weeks Hook.)

only in the immediate vicinity of the hot plate or electric bulb—is that right? A. It did.

Q. Did the hot plate or bulb have the effect of drying out the rest of the silk? A. It did. [237]

Q. The thermometer with which you took the temperature of the silk at all times was in the center of the mass? A. Not at all times.

Q. Where was it?

A. Taken at different parts of the silk.

Q. The temperature reached where the silk disintegrated or charred was, I presume, greatly in excess of the temperature which you have recorded there? A. That is true.

Q. The highest temperature recorded with the artificial heat, which were, for No. 1, 253.4° Fahrenheit, and for No. 2, 201.2° Fahrenheit, were obtained with the thermometer in what position?

A. Away from the center of the silk, or at places not directly above the electric bulb.

Q. What was the purpose of introducing the artificial heat in your experiments?

A. The purpose of introducing artificial heat in these experiments was to determine if there were present in the silk certain materials that with the application of heat to them would result in producing chemical reactions that are of an exothermic nature. An exothermic chemical reaction is a reaction that evolves heat or gives off heat.

Q. What is the difference, Mr. Hook, between fermentation and exothermic reaction?

A. The heat developed or produced by fermenta-

(Deposition of Russell Weeks Hook.)

tion is due to the action of bacteria, where in straight exothermic chemical reaction the heat produced is due to straight chemical reaction.

Q. In other words, the fermentation is produced by organic life in the silk—is that right?

A. It is.

Q. And the exothermic reaction is a chemical reaction, resulting in different make-up of the materials? [238]

A. Different materials present that might combine or unite in some way to produce a straight chemical reaction evolving heat. For example, a true exothermic reaction is in a case of slacking lime.

Q. Is the heating of coal and the resulting spontaneous combustion due to an exothermic reaction?

A. The heating of coal is due to an exothermic reaction.

Q. Did you observe any exothermic reaction in the silk waste? A. I did not.

Q. What produced the heat that was observed in your first experiments before you put in artificial heat?

A. The heat produced in my first experiments before applying artificial heat to the silk was due to the presence of bacteria in the silk.

Q. Is it possible for fermentation to produce heat sufficient to cause any danger whatever of spontaneous combustion?

A. Heat developed by the action of bacteria never reaches a dangerous degree.

(Deposition of Russell Weeks Hook.)

Q. Why not?

A. For example, heating of horse manure, which heats up to quite a high temperature, is due entirely to bacterial action.

Q. What happens to the bacteria?

A. The bacteria require to become active a certain amount of moisture. When this moisture is supplied they at once become active and start in generating heat. They will continue the generation of heat until a certain temperature is reached which kills the bacterial life, and they then become inactive and the temperature of the material that is being heated by the bacteria gradually decreases. Practically all forms of heat-producing bacteria do not survive a temperature greater than 212° F., or the temperature of boiling water. [239]

Q. In your opinion, did the bacteria acting in the silk waste in your experiments become inactive when the highest temperature was reached, which you found was attained within one or two days after the silk was wet?

A. I should say they did, by the results of my tests.

Q. Did the conditions which were present in the insulated ice chest with the artificial heat introduced, in your opinion, approximate the conditions that would have taken place in a loaded freight or refrigerator-car of silk waste which had been wet with sea water?

A. I should say they not only approximate the

(Deposition of Russell Weeks Hook.)

conditions of a loaded freight-car with silk, but were more drastic.

Q. What do you mean by that?

A. More severe.

Q. Would your answer be the same if we were to assume the loaded freight-car had come across the continent from Seattle, Washington, to Providence in the month of August, 1918?

A. My answer would be the same.

Q. What was the next experiment?

A. Further experiments were conducted with the silk waste for the purpose of determining if the gases evolved during the fermentation of the silk were of an inflammable nature. Tests were carried out to prove this, as follows: Approximately two to three pounds of both No. 1 and No. 2 silk waste were wet with ocean water and placed in large salt mouth bottles. To illustrate what a salt mouth bottle is, it is a large bottle with a large mouth, a receptacle in which solid chemicals are usually shipped to analytical chemists. After the wet silk had been placed in these bottles, the bottles were stoppered and carefully sealed with paraffine wax. Through the stoppers of the bottles two glass tubes were inserted. The ends of the tubes protruded through the cork to the air were provided [240] with suitable stopcocks or seals to prevent any air entering into the bottles. These sealed bottles were allowed to stand at ordinary room temperature, which would be approximately 60° to 75° F. at the time the tests were conducted, for a period of approxi-

(Deposition of Russell Weeks Hook.)

mately 48 hours. At the end of this time the gases accumulating in the sealed bottles due to the fermentation of the silk were withdrawn through the above mentioned glass tubes entering the bottles through the corks, and subjected to chemical analysis for the purpose of determining if the gases generated were of a combustible nature. Chemical analysis showed that these gases were not combustible nor would not support combustion.

Q. (By Mr. KORTE.) Were those poisonous gases or nonpoisonous, as you recall them?

A. I made no tests to determine whether they were poisonous or nonpoisonous. I can make this statement, that I have reason to believe that these gases consisted chiefly of ammonia, carbon dioxide and possibly some carbon monoxide. Understand me that I made no analysis to actually determine this. The ammonia, of course, was evident by the strong odor.

Q. (By Mr. LYETH.) Now did you determine whether or not they were inflammable gases?

A. This was determined by taking suitable quantities of the gases and passing electric spark through them.

Q. Did you thereafter examine the gas?

A. The gases were thereafter analyzed by standard process used by gas chemists for determining whether combustion had taken place or not.

Q. And no combustion had taken place?

A. No combustion had taken place.

(Deposition of Russell Weeks Hook.)

Q. Did you introduce oxygen for these gases? [241]

A. Oxygen was mixed with these gases and electric spark passed through the mixture of the evolved gases and oxygen, and no combustion was then noted.

Q. What was the purpose of introducing oxygen?

A. The purpose of introducing oxygen was to determine if there was any possible way to cause these gases to ignite. Oxygen, being one of the best supporters of combustion we have, was used to make the test as severe or drastic as possible.

Q. What was the next experiment?

A. The next experiment was conducted by taking a fresh sample of No. 1 Canton silk waste, wetting the same with sea water, placing it in the insulated chest, supplying artificial heat by means of electric bulb and allowing the silk to stand in this chest, being heated by the electric bulb, from the 16th of December until the 24th of December. During this test the opening at the top of the chest was closed with a cork stop. The opening at the bottom of the chest through which the wires ran to the electric bulb in the bottom of the chest was so arranged that as little air as possible could reach the inside of the chest by this source. After the silk had been standing and heating for approximately 24 hours the stopper at the top of the chest directly above the fermenting silk was quickly removed and a lighted burner or a gas flame pushed into the chest.

Q. Was that an ordinary Bunsen burner?

(Deposition of Russell Weeks Hook.)

A. That was a Bunsen burner. After waiting for a period of approximately three to five minutes the top of the chest was opened. It was found that the Bunsen burner was extinguished and there was a plain odor of illuminating gas mixed with ammonia evident. The surface of the silk at the point where the flame first struck it when being pushed into the chest was slightly charred.

Q. Have you the silk used in that experiment?

A. I have. [242]

Mr. LYETH.—I offer it in evidence.

Silk used in above described experiment offered and received in evidence and marked "Plaintiff's Exhibit 12. Deposition of R. W. Hook. Frank H. Burt, Notary Public." Said exhibit is transmitted to the Circuit Court of Appeals with all of the other original exhibits.

Q. Is the reddish yellow spot in Plaintiff's Exhibit 12 the place where the flame of the Bunsen burner touched the silk?

A. It is the place where the Bunsen burner touched the silk.

Q. What was the next experiment?

A. Experiments were conducted with samples of No. 1 and No. 2 silk waste by wetting two to three-pound samples of the silk with sea water and placing the same in large salt mouth bottles. The bottles were stoppered and two small openings of approximately ¼-inch diameter were left in the corks to provide a supply of air to the wet silk. In one case heat-producing bacteria were added to

(Deposition of Russell Weeks Hook.)

the silk, or, in other words, the silk was inoculated with horse manure. The bottles were placed in wooden boxes and insulated by means of surrounding them with sawdust. These tests were started around the 23d to 25th of September, 1920 and were continued to the 12th or 13th of November, temperature readings being taken daily of the room temperature as well as the temperature of the silk in the bottles. These temperatures are shown by the following tables:

No. 1 Canton Silk Waste Wet With Sea Water and Placed in a Large Glass-stoppered Bottle.

Date.	Temperature of Room. Degrees Fahr.	Temperature of Silk in Chest. Degrees Fahr.	Increase of Temperature of Silk over Room Temperature. Degrees Fahr.
9/25/20	75.2	86.0	10.8
9/27/20	73.4	86.0	12.6
9/28/20	73.4	82.4	9.0
9/30/20	75.2	82.4	7.2
10/ 5/20	68.0	75.2	7.2
[243]			
10/ 6/20	62.6	69.8	7.2
10/ 7/20	60.8	68.0	7.2
10/ 8/20	63.5	68.0	4.5
10/ 9/20	66.2	69.8	3.6
10/11/20	64.4	69.8	5.4
10/13/20	60.8	66.2	5.4
10/14/20	63.5	66.2	2.7
10/15/20	66.2	69.8	3.6
10/16/20	66.2	69.8	3.6
10/18/20	63.5	66.2	2.7
10/21/20	71.6	75.2	3.6

(Deposition of Russell Weeks Hook.)

Date.	Temperature of Room. Degrees Fahr.	Temperature of Silk in Chest. Degrees Fahr.	Increase of Temperature of Silk over Room Temperature. Degrees Fahr.
10/22/20	66.2	72.5	6.3
10/25/20	63.5	66.2	2.7
10/26/20	64.4	68.9	4.5
10/27/20	66.2	68.0	1.8
10/28/20	69.8	72.5	2.7
10/29/20	68.0	71.6	3.6
10/30/20	60.8	66.2	5.4
11/ 1/20	59.0	60.8	1.8
11/ 2/20	69.8	68.9	0.9 below
11/ 3/20	61.7	71.6	9.9
11/ 5/20	66.2	73.4	7.2
11/ 6/20	62.6	69.8	7.2
11/ 8/20	55.4	59.0	3.6
11/ 9/20	64.4	68.0	3.6
11/10/20	66.2	73.4	7.2
11/11/20	62.6	68.0	5.4
11/12/20	73.4	78.6	5.2
11/13/20	66.2	73.4	7.2

No. 1 Canton Silk Waste Wet With Sea Water and Inoculated With Horse Manure.

Date.	Temperature of Room. Degrees Fahr.	Temperature of Silk in Chest. Degrees Fahr.	Increase of Temperature of Silk over Room Temperature. Degrees Fahr.
9/23/20	66.2	71.6	5.4
9/24/20	69.8	77.0	7.2
9/25/20	73.4	82.7	9.3
9/27/20	73.4	82.7	9.3
9/28/20	73.4	78.6	5.2
9/30/20	75.2	80.6	5.4
10/ 5/20	68.0	71.6	4.6
10/ 6/20	62.6	68.0	5.4

(Deposition of Russell Weeks Hook.)

Date.	Temperature of Room. Degrees Fahr.	Temperature of Silk in Chest. Degrees Fahr.	Increase of Temperature of Silk over Room Temperature. Degrees Fahr.
10/ 7/20	60.8	64.4	3.6
10/ 8/20	63.5	66.2	2.7
10/ 9/20	66.2	68.9	2.7
10/11/20	64.4	68.0	3.6
10/13/20	60.8	65.3	4.5
10/14/20	63.5	66.2	2.7
10/15/20	66.2	68.0	1.8
10/16/20	66.2	68.0	1.8
10/18/20	63.5	66.2	2.7
10/21/20	71.6	71.6	0.0
10/22/20	66.2	69.8	3.6
10/25/20	63.5	64.4	0.9
10/26/20	64.4	68.0	3.6
10/27/20	66.2	66.2	0.0
[244]			
10/28/20	69.8	71.6	2.8
10/29/20	68.0	69.8	1.8
10/30/20	60.8	66.2	5.4
11/ 1/20	59.0	59.0	0.0
11/ 2/20	69.8	66.2	3.6 below
11/ 3/20	61.7	66.2	4.5
11/ 5/20	66.2	69.8	2.6
11/ 6/20	62.6	66.2	3.6
11/ 8/20	55.4	57.2	1.8
11/ 9/20	64.4	65.3	0.9
11/10/20	66.2	69.8	3.6
11/11/20	62.6	66.2	3.6
11/12/20	73.4	75.2	1.8

(Deposition of Russell Weeks Hook.)

The greatest increase in temperature of the silk in the bottles over the room temperature is as follows:

In the case of No. 1 silk waste wet with sea water alone, the greatest increase in temperature was 12.6° F.

In the case of No. 1 Canton waste wet with sea water and inoculated with horse manure, the greatest increase in temperature was 9.3° F.

This (producing sample) is a sample of No. 1 Canton steam waste moistened with sea water and placed in the bottle on September 24, 1920.

Mr. LYETH.—I offer that in evidence.

Sample of No. 1 waste moistened with sea water and placed in bottle Sept. 24, 1920, offered and received in evidence and marked "Plaintiff's Exhibit 13. Deposition of R. W. Hook. Frank H. Burt, Notary Public." Said exhibit is transmitted to the Circuit Court of Appeals with all of the other original exhibits.

Q. I show you a smaller glass jar labelled as follows: "No. 1 Canton Silk Waste wet with sea water and allowed to stand from 9/24/20 to 1/2/21." Signed "R. W. Hook," and also marked "Plaintiff's Exhibit 2, Jan. 3, 1921," and ask you whether the silk waste contained in this small jar was taken from the large salt mouth bottle marked "Plaintiff's Exhibit 13" on Jan. 2, 1921? A. It was.

Mr. LYETH.—I offer that in evidence. [245]

Q. The silk waste in this smaller bottle was taken from the large bottle in my presence on

(Deposition of Russell Weeks Hook.)

January 2d and you gave it to me? A. I did.

Q. Was the bottle marked "Plaintiff's Exhibit 13" kept in a box insulated with sawdust, such as you have described, from Sept. 24, 1920, until Jan. 3, 1921? A. It was.

Q. And you took it out of the sawdust on January 3d? A. I did.

Q. What was the next experiment?

A. Similar experiments as described above were conducted with No. 2 Canton silk waste by wetting with sea water and placing the silk in salt mouth bottles in one case, and by wetting with sea water and inoculating with horse manure in the other case. The temperatures recorded on these tests are as follows:

No. 2 Canton Silk Waste Wet With Sea Water and Placed in a Bottle.

Date.	Temperature of Room. Degrees Fahr.	Temperature of Silk in Chest. Degrees Fahr.	Increase of Temperature of Silk over Room Temperature. Degrees Fahr.
9/25/20	75.2	82.4	7.2
9/27/20	73.4	82.4	9.0
9/28/20	73.4	82.4	9.0
9/30/20	75.2	77.0	1.8
10/ 5/20	68.0	71.6	3.6
10/ 6/20	62.6	68.0	5.4
10/ 7/20	60.8	66.2	5.4
10/ 8/20	63.5	68.	4.5
10/ 9/20	66.2	69.8	3.6
10/11/20	64.4	69.8	5.4
10/13/20	60.8	66.2	5.4
10/14/20	63.5	66.2	2.7

(Deposition of Russell Weeks Hook.)

Date.	Temperature of Room. Degrees Fahr.	Temperature of Silk in Chest. Degrees Fahr.	Increase of Temperature of Silk over Room Temperature. Degrees Fahr.
10/15/20	66.2	69.8	3.6
10/16/20	66.2	69.8	3.6
10/18/20	63.5	66.2	2.7
10/21/20	71.6	75.2	3.6
10/22/20	66.2	72.5	6.3
10/25/20	63.5	66.2	2.7
10/26/20	64.4	68.9	4.5
10/27/20	66.2	68.0	1.8
10/28/20	69.8	72.5	2.7
10/29/20	68.0	71.6	3.6 [246]
10/30/20	60.8	66.2	5.4
11/ 1/20	59.0	60.8	1.8
11/ 2/20	69.8	71.6	1.8
11/ 3/20	61.7	73.4	6.7
11/ 5/20	66.2	75.2	9.0
11/ 6/20	62.6	69.8	7.2
11/ 8/20	55.4	59.0	3.6
11/ 9/20	64.4	71.6	7.2
11/10/20	66.2	78.6	2.4
11/11/20	62.6	71.6	9.0
11/12/20	73.4	82.4	9.0
11/13/20	66.2	78.6	2.4

No. 2 Canton Silk Waste Wet With Sea Water and Inoculated With Horse Manure.

Date.	Temperature of Room. Degrees Fahr.	Temperature of Silk in Chest. Degrees Fahr.	Increase of Temperature of Silk over Room Temperature. Degrees Fahr.
9/25/20	75.2	82.4	7.2
9/27/20	73.4	84.2	10.8
9/28/20	73.4	82.4	9.0
9/30/20	75.2	84.2	9.0

(Deposition of Russell Weeks Hook.)

Date.	Temperature of Room. Degrees Fahr.	Temperature of Silk in Chest. Degrees Fahr.	Increase of Temperature of Silk over Room Temperature. Degrees Fahr.
10/ 5/20	68.0	71.6	3.6
10/ 6/20	62.6	77.0	14.4
10/ 7/20	60.8	68.0	7.2
10/ 8/20	63.5	69.8	6.3
10/ 9/20	66.2	69.8	3.6
10/11/20	64.4	66.2	1.8
10/13/20	60.8	66.2	5.4
10/14/20	63.5	69.8	6.3
10/15/20	66.2	68.0	1.8
10/16/20	66.2	68.0	1.8
10/18/20	63.5	73.4	9.9
10/21/20	71.6	71.6	0.0
10/22/20	66.2	64.4	1.8
10/25/20	63.5	66.2	2.7
10/26/20	64.4	66.2	1.8
10/27/20	66.2	68.0	1.8
10/28/20	69.8	71.6	1.8
10/29/20	68.0	71.6	3.6
10/30/20	60.8	65.3	4.5
11/ 1/20	59.0	60.8	1.8
11/ 2/20	69.8	66.2	3.6
11/ 3/20	61.7	69.8	8.1
11/ 5/20	66.2	71.6	5.4
11/ 6/20	62.6	68.0	5.4
11/ 8/20	55.4	58.1	2.7
11/ 9/20	64.4	66.2	1.8
11/10/20	66.2	73.4	7.2
11/11/20	62.6	66.2	3.6
11/12/20	73.4	78.6	5.2
11/13/20	66.2	73.4	7.2

(Deposition of Russell Weeks Hook.)

The greatest difference in temperature of the silk over room temperature in the case where No. 2 Canton silk waste was [247] wet with sea water and placed in bottles was 9° F. In the case where No. 2 Canton silk waste was wet with sea water and inoculated with horse manure and placed in glass bottle, the greatest difference was 14.4° F.

Now, I conducted some tests with No. 1 waste and No. 2 waste, simply wetting with distilled water instead of ocean water and inoculating with horse manure.

Q. Just give the highest increase of temperature.

A. The highest increase in temperature in the case where No. 1 Canton silk waste was wet with distilled water, inoculated with horse manure and placed in large glass bottle, was 9.3° F. above room temperature. In the case of No. 2 Canton waste wet with distilled water, inoculated with horse manure and placed in glass bottle, the highest increase was 9.9° F.

Q. Did you find as a result of these experiments of inoculation with horse manure that any material increase in the temperature resulted from the presence of the horse manure?

A. No material increase.

Q. What was the next experiment?

A. Experiments were conducted with No. 1 and No. 2 waste by heating these wastes in an apparatus known as Mackay's Cloth Oil Tester. This is an apparatus used by chemists for determining the liability to spontaneous combustion of various tex-

(Deposition of Russell Weeks Hook.)
tile fibres and materials, especially those that contain oily, greasy or fatty matter. There are numerous tests that I have conducted with No. 1 and No. 2 wastes under various conditions. These conditions, in brief, have been saturating No. 1 and No. 2 silk wastes with oils, such as cottonseed oil and neat's-foot oil, and heating them up in the oil tester and recording temperatures obtained, and more especially to note the possibility of spontaneous combustion of these two silk wastes even when impregnated with excessive amounts of oil that are known to rapidly [248] heat or oxidize when subjected to artificial heat.

First Experiment: Seven grams of No. 1 silk waste were placed in the cage of a Mackay tester. The jacket of this tester was filled with water and the apparatus gradually heated by the means of a Bunsen burner. Readings of the temperature of the silk were taken every fifteen minutes and were as follows: At the end of the first fifteen minutes the temperature of the silk was 150.8° F. At the end of two hours heating the temperature of the silk was 201.2° F. The silk was removed from the tester and examined and was found to show no evidence of charring and appeared unchanged.

The same test was repeated on No. 1 silk with the exception that the jacket of the oil tester was filled with an oil having an extremely high boiling point. The object of using this oil in the jacket was to produce excessive high temperature in the

(Deposition of Russell Weeks Hook.)

air chamber of the apparatus in which the silk was exposed.

Q. What oil did you use?

A. I used an oil known as Hallowax oil. After heating the silk in this test for 1¾ hours the temperature of the silk was 348.8° F. The silk was removed from the tester and was found to have been slightly scorched and turned to a light shade of brown.

The next test, seven grams of No. 1 silk were saturated with fourteen grams of cottonseed oil, placed in the cage of the combustion tester and gradually heated.

Q. The same amount of silk waste?

A. The same amount of silk waste; seven grams of silk waste and fourteen grams of cottonseed oil. After heating for forty-eight minutes the silk showed a temperature of 392° F. At 392° F. the silk turned brown and smoke was coming through the vent tubes of the combustion tester. At the end of [249] fifty-two minutes the temperature of the silk was 410° F. and considerable smoke was escaping from the vent tubes. At the end of fifty-five minutes, a temperature of 464° F. was recorded.

The same test as above was repeated, only using seven grams of No. 1 silk and saturating this silk with fourteen grams of neat's-foot oil. The temperature of the silk at the end of one hour had reached 206.6° F.

The following tests were conducted with No. 2

(Deposition of Russell Weeks Hook.)

Canton silk waste in the Mackey Oil Tester:

Seven grams of silk were saturated with fourteen grams of cottonseed oil. In this test the jacket of the apparatus was filled with Hallowax oil. The test was started at 11.45 A. M. and concluded at 1:30 P. M. The temperature of the silk at the conclusion of the test was 383° F.

The same test with No. 2 silk was repeated, only saturating seven grams of silk with fourteen grams of neat's-foot oil. At the end of 1¾ hours heating the temperature of the silk was 384° F.

Mr. LYETH.—Just one minute. I think, Mr. Hook, we will put these samples in evidence; I think it will be interesting.

Mr. KORTE.—Those are the little bottles?

Mr. LYETH.—Those are the little bottles.

The WITNESS.—This one I have just described.

Mr. LYETH.—I offer that in evidence.

Sample contained in bottle labelled "Canton No. 2 Silk Waste Cottonseed Oil Hallowax Oil Bath 424.4° F." offered and received in evidence and marked "Plaintiff's Ex. 14. Dep. of R. W. Hook. Frank H. Burt, Notary Public." Said exhibit is transmitted to the Circuit Court of Appeals with all of the other original exhibits.

Mr. LYETH.—I offer in evidence bottle marked "No. 1 Canton Silk Waste saturated with cottonseed oil and heated to 464° F." Said bottle was received in evidence, marked "Plaintiff's Ex. 15. Dep. of R. W. Hook. Frank H. Burt, Notary Public," and said exhibit is transmitted to the Circuit

(Deposition of Russell Weeks Hook.)

Court of Appeals with all of the other original exhibits. [250]

Q. This bottle, marked "Plaintiff's Exhibit 15," contains silk that you used in the experiment with the cottonseed oil and No. 1 Canton waste?

A. It does.

Q. The bottle marked "Canton No. 2 Silk Waste, neat's-foot oil, Hallowax Oil bath, 424.4° F.," contains the silk waste used in the experiment you described with neat's-foot oil? A. It does.

Mr. LYETH.—I offer that in evidence.

The bottle above described is offered and received in evidence and marked "Plaintiff's Ex. 16, Dep. of R. W. Hook. Frank H. Burt, Notary Public." Said exhibit is transmitted to the Circuit Court of Appeals with all of the other original exhibits.

Q. You may proceed with the next experiment.

A. On examining the silk from the test where it was impregnated with fourteen grams of neat's-foot oil and heated, the silk was found to be scorched and charred, especially at the lower end of the cage in the heater. In conducting this test, smoke was given off soon after the test had been started. I think that covers practically all those tests. A number of them were duplication tests.

Q. In any of the tests which you conducted with the Mackey Tester and impregnated the silk waste with various oils, did you find any evidence of ignition or spontaneous combustion?

A. The silk that had been impregnated with the oils in none of the tests burst into flame. Some of

(Deposition of Russell Weeks Hook.)

the samples that had been saturated with cottonseed oil or neat's-foot oil and subjected to abnormally high temperatures did show evidence of discoloration and charring, but in no case did they burst into flame even when taken out of the tester and exposed to the air.

Q. Would the exposing of the silk at that high temperature, impregnated [251] with oil, tend to increase the chance of spontaneous combustion?

A. It would.

Q. Why?

A. There would be a chance for it to take on or absorb more oxygen at that high temperature, which would tend to result in a more rapid oxidation, and theoretically it would tend to ignite quicker.

Q. Did it ignite at any time?

A. In none of my tests has the silk ignited.

Q. From all the tests and experiments that you conducted, Mr. Hook, and from your general experience with textiles, will you give us your opinion as to the possibility of either No. 1 or No. 2 Canton steam silk waste under any circumstances igniting from spontaneous combustion?

A. It is my opinion that there is no possible chance of silk waste similar to grades No. 1 and 2 that I have experimented with igniting spontaneously.

Q. Do you know of any experiments that could be applied to this silk waste that would be more likely to produce spontaneous combustion than the experiments that you conducted?

(Deposition of Russell Weeks Hook.)

A. I can't conceive of experiments of a more drastic nature than I have made that could be conducted in endeavoring to cause silk waste to ignite spontaneously.

Q. What happens to the silk waste when you apply a flame to it?

A. On applying a flame to silk waste of these grades it is extremely difficult to make the silk burn. It tends to char; in some cases there will be a flame burst out and it will burn for a second or two, and it simply extinguishes itself and results in a charring at the particular spot where flame is applied. In no cases have I observed that there is any tendency of the flame to spread throughout the bulk of silk. [252]

Q. What is the effect of the ammonia gas,—that is, that you have testified you observed emanating from the fermenting silk waste which had been wet with sea water—with respect to supporting or extinguishing combustion, if combustion were present?

A. It would act as a most excellent extinguisher of combustion.

Q. Is it possible for combustion to continue where ammonia gas is generated?

A. That depends on the concentration of the ammonia gas in the atmosphere surrounding the material that is burning or in the process of combustion.

Q. Assume that the No. 1 and No. 2 Canton steam waste thoroughly wet with sea water in bales were loaded in refrigerator-cars, whether or not com-

(Deposition of Russell Weeks Hook.)

bustion could possibly be supported in the gas emanating from the fermented silk?

A. I cannot conceive of combustion existing or being supported in the presence of the amount of ammonia that would be evolved by the fermenting silk.

Q. Would that be specially true where the silk was confined and the ammonia not allowed to escape freely into the atmosphere? A. It would.

Q. Is there a considerable amount of ammonia generated by the fermenting of the silk, or is it a small amount?

A. It is a considerable amount of ammonia.

Q. (By Mr. KORTE.) What per cent?

A. I made no estimation of the percentage of ammonia evolved, but the ammonia is so strong that a bottle of the fermenting silk standing in a room even as large as this is clearly noticeable.

(The room referred to is 10x20x12 feet in height.)

Q. (By Mr. LYETH.) Assume, Mr. Hook, that a cargo of 500 bales of No. 1 Canton steam waste and 367 bales of No. 2 Canton steam waste had become thoroughly soaked, submerged in salt water, due to the stranding of the steamer in Puget Sound on or about [253] August 1st, 1918, and that the silk had thereafter been unloaded on a wharf at Tacoma, Washington, from August 7th to August 10th, and had been, while on the wharf, wet down with a hose at intervals; and assume further that the silk, on or about August 15th–16th had been loaded in refrigerator-cars in which ice had been

(Deposition of Russell Weeks Hook.)

placed, and that said refrigerator cars had been transported across the continent by what is known as "silk train" from Tacoma to Providence, R. I., the transportation taking approximately six days, and that the silk had been delivered at the factory of the plaintiff in Providence from three to four weeks after it had been originally wet,—will you state whether or not, in your opinion, there would have been any reasonable ground to suppose that there would have been danger of spontaneous combustion in the silk?

A. My answer is that there would be no reason to believe, under the conditions that you have described, that there would be spontaneous combustion of the silk.

Q. What, in your opinion, would be the highest temperature that the silk would reach at any time during the time that I have described and the conditions that I have described?

A. Not over 150° F.

Q. At what time would the silk reach its highest temperature, in your opinion?

A. The time that the highest temperature would be reached would be expected after 24 to 48 hours after the silk had been wet.

Q. Well, do you mean by that, after the silk had been taken out of the water and exposed to the air?

A. After it had been taken out of the water.

Q. Would the temperature thereafter tend to decrease or increase?

A. The temperature would tend to decrease.

(Deposition of Russell Weeks Hook.)

Q. Would the heat produced by the fermentation of this silk waste, [254] in your opinion, be greater or less than the heat produced by the fermentation of horse manure?

A. It would be less than the heat produced by horse manure.

Q. Would the heat produced by the fermentation of this silk waste be greater or less than the heat produced by other animal products which have been wet with salt water, such as wool, etc.?

A. That is, under same conditions?

Q. Under the same conditions?

A. I am unable to give a definite answer.

Q. In your experience in the textile mills and with textiles generally, is wool liable to spontaneous combustion, in your opinion?

A. It had been my experience that I had never heard or personally known of a case where raw wool—that is, wool in the grease as it comes from the sheep's back—or scoured wool has ignited spontaneously.

Q. Did you in your experiments observe a temperature produced by the fermentation of the silk waste alone of anything as high as 150°?

A. I did not.

Q. In your estimate of 150° what temperature of the outside air were you assuming?

A. In making that estimate of 150° I was assuming rather severe conditions; for example, cars placed upon sidings and exposed to the hot, intense summer sun for a considerable period of time.

(Deposition of Russell Weeks Hook.)

Q. Would the presence of ice in the refrigerator-cars tend to reduce that temperature?

A. I should say that would tend to retard the temperature.

Q. And would the wetting down of the silk at intervals tend to lower the temperature and retard the fermentation? A. Most certainly. [255]

Q. Your estimate of 150° maximum temperature was then based on the extreme conditions—

A. Very extreme conditions.

Q.—that would be experienced on a trip across the continent? A. Yes.

Q. Will you describe, Mr. Hook, what the process of fermentation is in silk waste, with particular reference to whether the gum ferments first or the silk fibre?

A. Practically all organic bodies or substances similar in character to silk waste contain varying amounts of bacteria. In order for these bacteria to become active it is essential that they first be supplied with a suitable amount of moisture. When this moisture is supplied they immediately become active, and their activities increase and as a result heat is generated, and they will live until a temperature is reached which kills the bacteria present, and the most common forms of bacteria that would be met with in substances similar to this silk do not survive a temperature above 212° F., or the temperature of boiling water.

Q. Do the bacteria attack the gum in the silk first, or the silk fibre?

(Deposition of Russell Weeks Hook.)

A. They first work on silk gum. You might consider that they feed on this silk gum and break down the silk gum, due to various reactions. And in fact there is a process practiced abroad for degumming silk that depends on bacterial action. The same process is used in the rotting—or, using the same term, degumming—of flax fibre. Both these processes depend on bacteria, the bacteria working on the silk gum gradually decomposing the same. Eventually, if fermentation was continued along for any length of time, it would tend to attack the actual fibre, with the result that there would be more or less tendering or weakening of the fibre. These processes of degumming [256] silk or rotting linen by bacterial action, for that reason have to be conducted under very careful chemical control in order that bacterial action does not continue for a long enough period to seriously attack or weaken the fibre.

Q. Assuming the conditions with respect to the cargo of silk waste described in my hypothetical question, would the bacteria of the fermenting process have materially weakened the fibre of this silk if it had been transported by silk train as described in that question—that is, within three to four weeks after it had been wet?

A. I shouldn't have expected to find any appreciable weakening to the actual fibre if it had been transported at once and been kept in a wet-down condition and wet down at several intervals during its trip across the continent.

(Deposition of Russell Weeks Hook.)

Q. Would the drying out of the silk by opening up the bales, exposing them to the atmosphere and the sun for a period of four to five months, have materially weakened the fibre?

A. It is my opinion that a wetting—constant wetting and drying-out of the silk—carried out for a period of four or five months, would result in the tendering or appreciable weakening of the fibre.

Q. Referring to the silk contained in the bottle and marked "Plaintiff's Exhibit 13," and in the small jar marked "Plaintiff's Exhibit 2, January 3, 1921," which you testified had been wet with sea water on September 24th and kept enclosed in a bottle insulated until January 3, 1921, have you examined the fibre of that silk, and if so, will you state whether or not, in your opinion, the fibre has been materially weakened?

A. I have examined sample of a silk taken from the bottle marked "Canton Waste No. 1," which has been moistened with ocean water and kept moist from the 24th of September up to the 2d day of [257] January, 1921, and it is my opinion that the fibre is not appreciably tendered or weakened.

Q. (By Mr. KORTE.) Is not, you say?

A. Yes.

Mr. LYETH.—That is the same silk that was shown to the witness Lownes at Providence.

Q. (By Mr. LYETH.) Have you examined the silk waste contained in Plaintiff's Exhibit 12, which had been wet with sea water and placed in the ice

(Deposition of Russell Weeks Hook.)

chest and dried by artificial means? A. I have.

Q. Will you state what the condition of the fibre of that silk is?

A. It is my opinion that the fibre is more or less tendered or weakened.

Q. Whether or not you can easily break the silk that has been dried by artificial means?

A. Silk that I have taken from that sample breaks in many cases quite easily, showing lack of strength.

Q. Can you state, Mr. Hook, from your experience in textile mills whether or not the strength or weakness of the fibre of silk waste materially affects the commercial value thereof?

A. It most certainly does affect the commercial value.

Q. In what way?

A. It produces, in the first place, in the process of manufacture a yarn that has little strength, which may offer more or less difficulties in the process of drawing and spinning; also it will offer difficulties in the process of warp preparation as well as in weaving and in the subsequent dyeing and finishing processes.

Q. What would be the result of the weakened fibre with respect to the cloth finally produced?

A. It would produce a cloth of inferior quality, and due to the fact [258] that the cloth would have poor strength it would have a tendency to burst or break quite easily. And I might add that a tendered fibre to start with in a process of manufacture under usual manufacturing conditions does

(Deposition of Russell Weeks Hook.)

not gain in strength, and subsequent processes of dyeing and finishing, if anything, tend to enhance this tendering and weakening, and as a final result you get an inferior fabric for reasons that I have stated above, chiefly due to the weakness of the original fibre.

Q. Would the wetting down of the silk under the conditions set forth in my hypothetical question tend to check the fermentation or the action of the bacteria?

A. It is my opinion it would tend to check the fermentation.

Q. Assume, Mr. Hook, that a cargo of Canton steam waste, 500 bales of No. 1 and 367 of No. 2, had been thoroughly wet in the hold of a steamer which had stranded in Puget Sound on August 1, 1918, and had thereafter been unloaded from the steamer on the wharf at Tacoma, Washington, from August 7th to August 10th, and had been wet down with a hose from time to time, and had been partially loaded into refrigerator-cars on August 15th to 16th, in which it was intended to put ice, and that it was intended to transport the silk in the refrigerator-cars, iced, by silk train service across the continent to Providence, R. I., in about six days,—would a person occupying the position of Claim Agent of the railroad, assumed to have experience in handling cargoes generally, have been reasonably justified in assuming that the cargo was dangerous and liable to spontaneous combustion?

(Objected to. The witness is incompetent to ex-

(Deposition of Russell Weeks Hook.)

press his opinion on the subject, and the question calls for an opinion in relation to facts which either the jury or the Court must pass upon as the ultimate question in the case; and it does not call for an opinion upon a technical question or involving technical knowledge which either [259] the Court or the jury are not familiar with.)

A. My answer would be that they would not be justified in refusing shipment of a cargo under conditions as stated.

Q. (By Mr. LYETH.) Mr. Hook, have you the wooden grids or cleats on which you placed the silk waste in the insulated ice chest and which were charred or burned? A. I have.

Q. Will you produce them? (Wooden grids produced by witness.)

Mr. LYETH.—I offer that in evidence.

(Grids, marked "Plaintiff's Exhibit 17. Deposition of R. W. Hook. Frank H. Burt, Notary Public," offered and received in evidence. Said exhibit is transmitted to the Circuit Court of Appeals with all the other original exhibits.)

Cross-examination by Mr. KORTE.

Q. Mr. Hook, in speaking of Exhibit No. 12, which is the sample of waste silk which you testified you wetted with sea water and heated directly to dry it, you said that the fibre was injured or weakened. Can you tell me the per cent of weakening of the fibre?

A. No, sir. I have no way of telling you the

(Deposition of Russell Weeks Hook.)

actual per cent of weakening. That could only be really ascertained by having that stock degummed and spun into yarn and then making a breaking strength of the yarn. Any individual breaking strength of the fibres as they now exist, I doubt very much would be of any value.

Q. You spoke of this shipment moving and the condition in which it was offered to the Railway Company, having been saturated with sea water during the period that the ship was grounded, which was between seven and ten days, and then unloaded on the dock, and then thereafter loaded on the cars and moved here to Providence, R. I.; that it would have to be wetted down at times, at intervals en-route; is that what you meant? [260]

A. It would be best to wet it down at intervals during this trip across.

Q. And if it did not it would be apt to damage?

A. Apt to damage.

Q. And do you think it was necessary to have the car iced—put in a car that had been iced, a refrigerator-car?

A. That is simply an extra precaution. It certainly would, in my opinion, be effective.

Q. You would not advise the shipment to go forward without at least being kept wet at intervals?

A. I would keep it wet, yes.

Q. You would not advise having it sent forward without that treatment or precaution?

A. I should keep it thoroughly wet during transit.

Q. Now in speaking of spontaneous combustion,

(Deposition of Russell Weeks Hook.)

Mr. Hook, and of ignition, you mean by ignition, a flame? A. I do.

Q. Yes, that is right. That silk waste, under the conditions which you have tested it, will not spontaneously flame?

A. I have not been able to produce a flame.

Q. Will it do anything short of the flaming by way of heating or burning?

A. Will you state that question again?

Q. I say, will silk waste such as you have experimented with cause anything short of a flame by way of burning, by reason of its spontaneously heating under the conditions which you have tested it on, which you have in mind that this particular cargo was in at the time?

A. Your question is not clear.

Q. Will it heat to the extent of burning or charring—that is, take the life out of the material itself, heat to that extent? [261]

A. I have been unable to obtain any degree of temperature high enough for the silk to char by a natural fermentation.

Q. What degree of heat would be necessary to produce either a flame or a charring condition? Well, take the charring condition first.

A. The ignition point of silk, to my knowledge, has never accurately been determined. I should take it, a point at about which you might assume silk would char and disintegrate would be a temperature or around 348° F.

Q. 348?

(Deposition of Russell Weeks Hook.)

A. That is the temperature at which silk starts to decompose.

Q. At what temperature would you say that it had become so hot that you could not handle it by hand?

A. Basing my statement on comparison with water, the average person can stand a temperature around 125° to 130° hot water, and a person like anybody that is familiar with handling hot water, like chemists, will probably stand up to 140° to 150°, but he immediately wants to take his hand away.

Q. Exactly. Now, the make-up of the silk fibre is of two compounds, is it not? A. It is.

Q. State what those two compounds are.

A. It consists of two compounds primarily; the actual silk fibre, known as fibron—f-i-b-r-o-n; the other constituent is silk gum, known as sericine; s-e-r-i-c-i-n-e, I believe. In addition to the actual fibre, the fibron, and the silk gum or the sericine, there are small amounts of oily, fatty and waxy matters, as well as natural coloring matter, or pigmentary matter, as it is sometimes called.

Q. Both of these compounds are soluble, are they not? They will dissolve, will they not? [262]

A. That depends on what solvent you use.

Q. Well, take the solubility of any organic matter; this will come within that class, will it not?

A. You have to specify some special solvent when you—

Q. Well, wouldn't it dissolve say in sea water applied to it?

(Deposition of Russell Weeks Hook.)

A. Sericine is soluble in water. That is the silk gum. The fibre itself, the fibron, would be considered as insoluble in water.

Q. Any kind of water? That is, I am speaking of sea water, Mr. Hook. But it is subject, of course to attack by the bacteria which may be in the sea water, would it not, if there was bacteria in it?

A. The sericine—

Q. Yes. A. —or the fibron?

Q. And the fibron. Pardon me right there. For instance, the sericine or the gummy substance, as we call it, would be first attacked, would it not, by the bacteria?

A. I believe the sericine would be the first.

Q. Then when that was through the bacteria would necessarily attack the fibre, would they not?

A. You would naturally expect they would attack the fibre.

Q. And if the silk waste had been left in the sea water longer than it should have been in order to prevent that condition, you would have a weakening of the fibre by reason of over-maceration? What I mean by over-maceration is the overtime allowed for the degumming.

A. Under those conditions I should imagine that a great deal or a large amount of the sericine would be dissolved out or dissolved away from the actual silk fibre, and, in any case, the sericine would be softened up to a considerable extent by the salt water. [263]

Q. And then would not the fibre be attacked if

(Deposition of Russell Weeks Hook.)

it still remained in the salt water after that period of time?

A. I couldn't definitely state as to whether the fibre would be attacked to any extent or not under those conditions and the period of time in which it was submerged in salt water.

Q. How long a time, if you know, should raw silk be left in moistened or wet condition in order to remove the gummy substance?

A. I couldn't state definitely. That depends a good deal on temperature conditions.

Q. I think probably you are not acquainted with that branch of the industry?

A. Not if that refers to the process I was speaking of this morning—that of maceration.

Q. In your opinion, do you say that the saturated condition of the silk during a period of, say, ten days from the time it would be on the docks until it got here to Providence, would not affect the fibre?

A. As long as it was kept wet, well saturated, I doubt if there would be any appreciable tendering or weakening effect of the actual silk fibre.

Q. This particular kind of organic matter is what we term as nitrogenous matter?

A. It is a nitrogenous compound.

Q. In your opinion, nitrogenous matter will not spontaneously flame under any conditions? I am speaking now of nitrogenous matter that has not been inoculated with anything else?

A. To the best of my knowledge and experience, I have never known of substances that are of a

(Deposition of Russell Weeks Hook.)

nitrogenous nature similar to silk igniting spontaneously.

Q. What do you call nitrogenous matter that is similar to silk? Can you mention some?

A. For example, wool. [264]

Q. Hair? A. Hair.

Q. You say that that will not spontaneously burn or char?

A. To my knowledge, I have never heard of cases where it did.

Q. Would you classify, for instance, packing-house tankage as similar to this nitrogenous matter, this waste silk?

A. That is nitrogenous; it contains nitrogen.

Q. Have you ever heard of that spontaneously charring or burning? A. Personally I never did.

Q. And garbage tankage, which we find?

A. I never have.

Q. And, for instance, textile waste, such as the clippings from the tailors' shops and those things; have you heard of them spontaneously burning or charring?

A. Personally, I have never heard of those materials—

Q. What is your belief along that line from your technical knowledge you have on the subject?

A. A different feature is introduced into the case when you speak of tailors' clippings and things like that.

Q. Is wool—cotton is not nitrogenous, is it?

(Deposition of Russell Weeks Hook.)

A. It is not.

Q. Is hay a nitrogenous compound?

A. Hay, to the best of my knowledge, contains nitrogenous matter.

Q. Have you ever heard of hay spontaneously burning?

A. Personally, I have never known of hay spontaneously burning.

Q. Or jute?

A. I have never known of jute spontaneously igniting.

Q. Well, to be fair with you, I want to say, when you say "spontaneously burn," that it will heat to the extent of charring and hay, for instance, to flaming? You have never heard of it?

A. No. [265]

Redirect Examination by Mr. LYETH.

Q. In answer to Mr. Korte's questions, you spoke about a different feature entering into the question of textile waste and tailors' cuttings and the like. What is that feature?

A. With tailors' cuttings and textile wastes in a great many cases, these materials from the time they are manufactured have a chance to come in contact or pick up more or less varying amounts of oily or greasy matter; and it is a well-known fact that textile materials, especially cotton, that contain oily or greasy matter, when stored will heat up, and if there are sufficient amounts of oily or greasy matter present, there may be enough heat

(Deposition of Russell Weeks Hook.)

develop to cause spontaneous combustion.

Q. What is the chemical action that takes place in such cases?

A. The chemical action that takes place in a case of spontaneous combustion due to such foreign materials with oily or greasy matter being present, is due to a rapid oxidization of the oil, or the oil, in other words, absorbing oxygen, and that rate of absorption and oxidization rapidly increases with the development of heat, which may be of such a degree that it will cause ignition. That can best be illustrated, perhaps, by citing a linseed oil which we are all familiar with. Linseed oil is a nondrying oil and it is an oil that rapidly absorbs oxygen from the air, and textile materials containing appreciable amounts of this oil or oil of similar character will heat up due to that oxidation. And that rapid oxidation is further shown in the mixing of paints where linseed oil is part of the vehicle, which, when spread out over a large surface, gives the oil a chance to rapidly oxidize and forms a thin film.

Recross-examination by Mr. KORTE.

Q. That suggests a question, Mr. Hook. Would it make any difference in relation to this particular cargo if it had been saturated [266] somewhat with oil, say cocoanut oil, and come in contact with it? Would that have increased this condition, so far as spontaneous burning and flaming is concerned?

A. If there had been appreciable amounts of oil

(Deposition of Russell Weeks Hook.)

in that silk they would have a tendency to cause the silk to ignite spontaneously quicker than if it was free from all traces of oil.

Q. And would it make any difference if this cargo of raw silk was inoculated with sewage water rather than ordinary sea water as you tested it with?

A. If here were appreciable amounts of sewage water present, that would tend to increase the bacterial content of the silk and possibly would promote more active fermentation.

Q. And that would increase the heat?

A. That would develop heat. I can't say whether it would increase the heat any more than the natural bacteria present or not.

Q. It would not, then, increase the rise in temperature or the heat in the bales under those conditions?

A. I should not expect it would.

Redirect Examination by Mr. LYETH.

Q. Well, in your experiments, Mr. Hook, you inoculated the silk waste with a great deal more oil than the amount of the silk waste, and further you heated it to an extremely high temperature, and you were unable to cause spontaneous combustion?

A. I was unable to cause the silk to ignite spontaneously or burst into a flame.

Q. Therefore, in your opinion, with these grades of silk waste would the presence of so-called flammable or oxidizing oils have produced any dangerous spontaneous combustion without artificial heat?

(Deposition of Russell Weeks Hook.)

A. Will you state that question again? (Question read.) [267]

A. I wouldn't say that they would produce, but there would be great danger with excessive amounts of these oils present that the silk might be subjected to certain conditions that might ultimately result in combustion if large amounts of oils were present.

Q. Assume the conditions present in my hypothetical question with respect to the cargo of silk wastes in this suit, then when the bales were taken out of the hold of the vessel there were sticking to the straw coverings of the bales, beans or rice—would that, in your opinion, have caused any danger of spontaneous combustion?

A. None whatsoever.

Q. Mr. Korte asked you about the necessity of having the silk wet down frequently during transit, and, as I recollect, you answered that it would be desirable to wet it down. Did you have reference to the danger of spontaneous combustion or to preservation of the silk fibre?

A. The preservation of the silk fibre.

Q. Do you think it would have been necessary, to eliminate danger of spontaneous combustion, to wet it down during the transit?

A. It would have been very wise precaution, in my mind.

Q. (By Mr. KORTE.) Water is a very good con-

(Deposition of Russell Weeks Hook.)

ductor of heat—it will dissipate whatever heat there was? Isn't that true? A. Yes.

Q. (By Mr. LYETH.) Will you give us the chemical content of the fibron?

A. I can give you the elements that it is composed of; I can't give you the actual percentage of composition offhand. Fibron consists of carbon, hydrogen, oxygen and nitrogen.

Q. What elements are in wool fibre?

A. Wool fibre is very similar in composition to the silk, with the exception that wool fibre contains in its composition sulphur and silk does not. In other words, wool consists of carbon, hydrogen, [268] oxygen, nitrogen and sulphur.

Q. Whether or not the presence of sulphur in wool would increase the danger or tendency to spontaneous combustion over that of silk?

A. I couldn't say that it would, but from a theoretical standpoint I should say possibly that the presence of sulphur might make the wool more liable to spontaneous combustion than silk.

Q. (By Mr. KORTE.) What are the chemical contents in the sea water?

A. Sea water consists chiefly of sodium chloride salt, magnesium chloride, calcium cloride, and I believe there are small amounts of potash salts and some phosphates. That is a rough approximation.

Q. And the relative quantities—can you give them —in reference to the first that you mentioned?

A. I couldn't offhand; I don't recall just the pro-

(Deposition of Russell Weeks Hook.)

portions. The principal ingredients are, of course, common salt, and in less quantities calcium chloride and magnesium chloride.

Q. (By Mr. LYETH.) Whether or not, Mr, Hook, the presence of these salts in the sea water which wet the silk waste would tend to increase the danger of spontaneous combustion or decrease it?

A. I believe they would have a tendency to decrease it.

Q. Is it not the general theory that salt is a deterrent to combustion? A. It is.

Q. In your testimony you said that you would advise the wetting down of the cargo of silk waste referred to in my hypothetical question. Did you have in mind the checking of the danger of spontaneous combustion?

A. I did not.

Q. What did you have in mind?

A. I had in mind keeping the silk in a thoroughly wet condition to prevent subsequent injury to the fibre. [269]

Q. Assuming the facts as stated in my hypothetical question yesterday with respect to the cargo of 867 bales of Canton steam waste, will you state what, in your opinion, would have been the best way to have handled the silk to prevent injury to the fibre?

A. By keeping it well wet down.

Q. Would the drying of the silk by exposing it to the atmosphere at Seattle in August, September,

(Deposition of Russell Weeks Hook.)

October and November, in your opinion have tended to weaken the fibre materially?

A. Silk after it has been once wet should be kept in a wet condition in order to prevent tendering or weakening in the fibre.

Q. That is, until it is boiled or degummed?

A. Until it is completely degummed.

Q. What is the effect of drying or attempting to dry it out in the natural atmosphere with respect to the weakening of the fibre?

A. Attempting to dry it out would tend to possibly enhance fermentation and thereby tendering the actual silk fibre.

Cross-examination by Mr. KORTE.

Q. You would keep it then in the condition, would you not, Mr. Hook, as the waste silk is now in, contained in the bottle, Plaintiff's Exhibit 13? You would keep it in that moist condition, would you? Would that be sufficient? Until it was ready to be degummed?

A. I would keep it in a wet condition until it was ready to be degummed.

Q. Would that be sufficient wetness as shown in Plaintiff's Exhibit 13?

A. More water would not do any harm.

Q. And when you speak of keeping it in a wet condition, it would require, of course, wetting it and keeping it wet while it [270] was traveling from Tacoma to Providence, Rhode Island, to the mill?

A. It would be advisable to keep it well wet down.

Deposition of Harry Albert Mereness, for Plaintiff.

And to further prove the issue on plaintiff's part, the deposition of HARRY ALBERT MERENESS was introduced and read in evidence, as follows:

(By Mr. LYETH.)

Q. What is your full name?

A. Harry Albert Mereness.

Q. What is your occupation, Mr. Mereness?

A. I am operating chemist for the National Spun Silk Company of New Bedford.

Q. How long have you occupied that position?

A. Since May, 1919.

Q. What are your duties as operating chemist for the National Spun Silk Company?

A. Well, in the first place, I have the chemical control of the mill products; that is, the processing all the way through the mill; and, in the second place, as operating chemist, the operating end of it. I am responsible for the processing of the raw waste through the degumming stage, that is, until the gum is removed from the silk. I also look after the work for the Klotz Throwing Company, 25 Madison Avenue, New York.

Q. Are you chemist for the Klotz Throwing Company?

A. Yes, I am chemist for the Klotz Throwing Company.

Q. You look after their mills, the chemical work?

(Deposition of Harry Albert Mereness.)

A. I look after their raw products, the control of their raw products. [271]

Q. How many mills have they?

A. Twelve or fourteen; twelve, I think; twelve mills.

Q. Will you state briefly, Mr. Mereness, what your experience has been as a chemical engineer, your education?

A. From 1907 until 1909, those three years, '07, '08 and '09, I was a chemist in three different government laboratories working on arsenal supplies and ordnance materials. In 1912 I was graduated from Harvard with degree of A B. I specialized in chemistry and mining engineering. In 1913 I was with the Government again and the latter part of that time went with the Embree Iron Company of Embreeville, Tennessee, as chemist, and later as chemist and engineer. The work there consisted of routine work principally, on zinc products.

In 1914, at the outbreak of the war, I went with the Du Pont Company as Chief Chemist of their Carney's Point Works, Carney's Point, New Jersey, and I was there all during the war, first as Chief Chemist and later as Supervisor of Laboratories. And then in the Spring of '19 I came with the National Spun Silk Company in my present capacity.

Q. In your capacity as operating chemist for the National Spun Silk Company, have you had experience and have you handled Canton steam waste of the grades No. 1 and No. 2?

(Deposition of Harry Albert Mereness.)

A. My principal—you might say my principal job is the handling of steam wastes and other varieties of raw waste in the preliminary processing stages—that is, what we call boiling off—and that is my principal job; that is what I am paid for doing, in other words.

Q. Have you had occasion to handle or had any experience with Canton steam waste which has been wet with salt water?

A. In an operating way I have not. That is, what I mean by that, in large quantities; I have never had any large quantities. [272]

Q. Have you ever had silk waste, steam waste, wet in the plant?

A. We have had steam waste wet in the plant and also received in cars in wet condition. Just recently we received a shipment wet through from leaky cars, 415 bales wet down pretty well.

Q. Have you had occasion to conduct any experiments at my request with Canton steam waste, wetting it with sea water to observe whether or not there is any danger of spontaneous combustion?

A. During the month of October last year, 1920, at your suggestion, I took some No. 1 steam waste —Canton steam waste—and wet it with sea water and subjected it to a series of drying-out tests with repeated soaking in salt water. In these drying-out tests I gradually increased the temperature of drying from normal room temperature—which I imagine at that time must have been around 75—to something around 285 to 290 degrees Fahrenheit.

(Deposition of Harry Albert Mereness.)

Q. Will you state from your experience in those tests and from your experience with wet Canton steam waste in the mill, whether or not, in your opinion, there is any possible danger of spontaneous combustion in Canton steam waste which has been wet with salt water?

A. In a general way I would say that I cannot conceive of an ordinary condition, either allowing material to dry naturally at ordinary room temperatures or through heating at temperatures below 280° Fahrenheit, of any chance of spontaneous combustion.

Q. You found no evidence—

A. Wait a minute; that question said, wet with sea water?

Q. Yes. A. All right.

Q. In your experiments which you conducted at my request did you find any evidence or tendency for the silk waste to ignite spontaneously?

A. No, none whatsoever. [273]

Q. What happens when the silk waste is wet?

A. When silk waste is wet in a bale we get an ordinary fermentation which causes a local heating. As the bale dries out the heating ceases; if the process of drying out is sufficiently prolonged the silk becomes discolored and when boiled off has a gray cast.

Q. Assume, Mr. Mereness, a cargo of 500 bales of No. 1 Canton steam waste and 367 bales of No. 2 Canton steam waste had been stowed in a hold of a ship which stranded in Puget Sound on or

(Deposition of Harry Albert Mereness.)

about August 1, 1918, and that that hold had become flooded with sea water, and that thereafter the vessel had been floated and the wet bales of waste had been unloaded on an open dock on or about August 7th to August 10th; and assume further that the wet bales had been loaded in refrigerator-cars which had been iced or on about August 15th to 16th, and that said refrigerator-cars loaded with bales and iced had been transported across the continent to Providence, Rhode Island, by a silk train service, occupying a time approximately six days, and had arrived at the mill of the American Silk Spinning Company, the plaintiff in this action, between August 21st and August 30th, a period of from three to four weeks after it had been originally wet,—will you state whether or not, in your opinion, there would have been any danger of spontaneous combustion in the silk?

A. Under the conditions as stated, I do not believe that there would have been any chance for spontaneous combustion to have taken place.

Q. Assume the conditions in my previous question up to the time that the wet silk had been unloaded on the dock at Tacoma, Washington, and had been partially loaded in refrigerator-cars on or about August 15th, and that the silk had previously been wet down, whether or not, in your opinion, there would have [274] been evidence of excessive heating such as to justify an assumption that there would be danger of spontaneous combustion?

Mr. KORTE.—If the answer to the question

(Deposition of Harry Albert Mereness.)

leads up to the exercising of the judgment of an ordinary individual dealing with the particular subject, I object to the question as incompetent, immaterial and irrelevant and the witness is not competent to give his opinion upon the subject; and it calls for the opinion on a subject which an expert is not allowed to state his opinion upon, and it is the conclusion of a given state of facts which the jury or the Court must pass upon.

The WITNESS.—It is a question of fact? That is, I can't—(pausing).

Mr. LYETH.—Strike it all out.

The WITNESS.—No, I can't answer it to save my neck; I can't do it.

Mr. KORTE.—Why can't you?

The WITNESS.—If I had been there I could.

Mr. LYETH.—I didn't hear what you said.

The WITNESS.—I say if I had been there I could. You see the point is this: If I had seen it —I have my idea how it looked, undoubtedly, but the opinion isn't worth anything; somebody else would have to testify as to how it did look. But if you explain to me how the thing felt and looked and whether it was hot or cold and how it smelled, too, if you want—I don't care anything about that —then I could express an opinion as to the condition of the silk at that time.

Q. Assume further that when the silk waste had first been discharged from the vessel, it had heated to some extent and that it had been wet down by hose, and that on August 15th and 16th the heat-

(Deposition of Harry Albert Mereness.)

ing had reduced and that in some bales it had disappeared entirely; that ammonia fumes were coming off,—whether or not, under those conditions, there would have been reasonable ground for assuming that there was any danger from spontaneous combustion in transporting the cargo in refrigerator-cars iced across the continent?

And to that question the defendant objected, on the ground that the question is incompetent, immaterial and irrevelant, and the witness is not incompetent to give his opinion on the subject, and it calls for an opinion [275] on a subject which an expert is incompetent to give, and it is the conclusion of a given state of facts which the jury or the Court must pass upon.

But, notwithstanding said objection, the witness was permitted to answer the question as follows:

A. Under the conditions that you have outlined, I have no reason to believe that there would be any danger due to spontaneous combustion in shipping the cargo.

And to that testimony the defendant excepted, and his exception was allowed by the Court.

Q. Whether or not the icing of the refrigerator-cars would reduce the tendency of the cargo to heat or reduce any possible danger of spontaneous combustion?

A. I didn't catch that question; what do you mean "whether or not"?

Q. Will you state whether or not in your opinion?

(Deposition of Harry Albert Mereness.)

A. Oh, whether or not the icing of the car would help to prevent the thing heating up and so on and so forth?

Q. Yes.

A. Fermentation of the sericine or silk gum takes place ordinarily at temperatures—takes place more rapidly at temperatures around 130° or 140° Fahrenheit, and to the best of my knowledge the temerature in an iced refrigerator-car would so far reduce the temperature as practically to preclude any further fermentation.

Q. From your experience, have you ever observed or heard of Canton steam waste which had been wet either with fresh or with sea water igniting from spontaneous combustion?

A. I have not, no, sir.

Q. Have you ever had the experience of having foreign matter in silk waste ignite in the dryers?

A. The only condition under which I have ever observed a fire in silk—not *of* silk, in silk—a fire in silk, is a case where floor sweepings containing numerous very fine wood splinters had been intimately mixed with degummed silk and dried in a dryer at a [276] temperature of about 300° Fahrenheit, and then piled into a sizable pile and allowed to stand without cooling—simply pile it right into a pile, stack it up.

Q. And what happened?

A. Under these conditions, we noticed a very decided smell of smoke, though none was visible, and in digging into the pile we found that sections say

(Deposition of Harry Albert Mereness.)

a foot in diameter where these splinters had been more numerous were charred; the wood had burned up, the splinters had burned up and the silk had simply charred—always on the inside of the pile.

Q. Had the silk burned itself?

Mr. KORTE.—He says charred.

The WITNESS.—Well, it amounts to the same thing. It amounts to the same thing exactly.

Q. The fire did not spread in the silk?

A. Oh, no. When I unearthed some of it these little splinters—I assume the pine floor—I don't know it, but all these splinters were aglow; the oxygen from the outside would blow over it and they would glow again, but the heat from some of the splinters had charred the silk.

Q. Assume the conditions, Mr. Mereness, in my first hypothetical question; that is, that the wet silk had been transported by silk train service in refrigerator-cars iced, having previously been wet down with hose, and had arrived at the mill in Providence from three to four weeks after it had been originally wet and had immediately been put into manufacture and boiled upon arrival,—whether or not, at the time the silk would have arrived at the mill in Providence, there would have been any weakening of the silk fibre due to fermentation or to any other cause?

A. Very slight, if any. [277]

Q. Assume that this cargo of silk waste had not been forwarded as indicated in my hypothetical question, but had been dried out on the beach at

(Deposition of Harry Albert Mereness.)

Seattle, Washington, by breaking open the bales and exposing them to the air out of doors for a period of about three or four months,—whether or not, at the expiration of that time and after attempting to dry it in this fashion, the fibre would have been materially weakened?

A. Under those conditions I would say that the fibre would be somewhat weakened; to what extent I would not be prepared to say. The word "materially" is a pretty liberal word to use.

Q. Which substance in silk waste do the bacteria attack or work upon first, the sericine or the silk fibre? A. The sericine; the gum.

Q. If the bales of silk waste referred to in my hypothetical question, instead of being forwarded promptly by silk train service in its wet condition, had been dried by opening the bales in the atmosphere at Seattle, Washington, for the period of three or four months, would the bacteria, in your opinion, have attacked and weakened the fibre of the silk in that period to a greater extent than if it had been shipped promptly?

A. My answer to that is, the effect of the bacteria on the silk would undoubtedly be much more marked in the case where the silk was exposed to the elements on an open beach or the open atmosphere.

Q. Mr. Mereness, I show you some silk waste in a bottle marked Plaintiff's Exhibit 13 and ask you to examine that and state whether or not the fibre in that silk has been weakened.

(Deposition of Harry Albert Mereness.)

A. This I assume is first grade steam waste?

Q. No. 1 Canton steam waste.

A. I do not find any appreciable weakening of the fibre.

Q. I show you silk waste contained in bottle marked "Plaintiff's [278] Exhibit 2, Jan. 3, 1921," and ask you to examine that and state where there is any weakness in the fibre, likewise No. 1 Canton steam waste.

A. I find no evidence of weakening of the fibre in this case.

Cross-examination by Mr. KORTE.

Q. Mr. Mereness, when that cargo reached the docks there in Seattle, if they had immediately washed the silk waste, degummed it and then dried it, that would have been the proper thing to do, wouldn't it, or shipped it on to the factory?

A. Yes, even without washing it.

Q. If they had dried it?

A. If you could have degummed it soon enough, within a reasonable time, just let it alone just as it was, it wouldn't have done a thing to it. I never make any efforts to dry out stuff that comes in wet.

Q. When you get a wet bale you leave it out in the open and dry it?

A. Yes, let it take care of itself.

Q. Exactly. Of course, shipping this the distance from Seattle to Providence, taking in the neighborhood of six, seven or eight days—I am not certain which—if the traffic came through ordi-

(Deposition of Harry Albert Mereness.)

narily, it would still ferment on its way, wouldn't it, and in its wet condition?

A. What season of the year was this?

Q. August, 1918. A. This was in August?

Q. Yes.

A. In ordinary cars, yes, I should say so.

Q. And in order to prevent the fermentation you would either have to cool it off entirely, would you not, to keep the bacteria from working—

A. Or cool them to a degree where they couldn't work any more. [279]

Q. Where they couldn't work any more?

A. Where they couldn't work any more.

Q. And it would take refrigeration all the time constantly to that degree, would it not, in the car if you attempted to carry it by refrigeration?

A. Yes, I should say that fermentation takes place very readily in temperatures slightly above 100° and very slowly at temperatures around 40° or 50° Fahrenheit.

Q. That is what I thought; between 40° and 50° up to 100°?

A. Probably below 40°, nothing. I don't know as to that. I have simply observed it in places where it has been wet and the temperatures vary, but I know in the fall when it once gets a little cool it stops, it doesn't bother us any more.

Q. Of course, the cooler the temperature the less fermentation or working of the bacteria will take place? A. Yes.

Q. Would you advise shipping that cargo from

(Deposition of Harry Albert Mereness.)

Tacoma to Providence, Rhode Island, without keeping it constantly wet, without refrigeration?

A. Yes, I would.

Q. You would order that done?

A. I would myself, yes.

Q. And it would have to be watered down at intervals as the cargo moved? A. Yes.

Q. Yes. A. With or without watering down.

Q. You think you would ship it without watering down?

A. Yes, I would have been perfectly—it wouldn't have entered my head, in fact, to question a cargo of silk under those conditions, knowing silk. [280]

Q. Yes, but wouldn't you have to prevent fermentation in order that the fibre wouldn't be attacked? Over-fermentation will attack the fibre, will it not? A. Yes.

Q. The bacteria first destroy the gum and next—

A. The fibre.

Q. The fibre?

A. But your conditions were that it was to get there in seven to ten days?

Q. Yes, but it had been prior to that time wetted for at least fourteen days in a fermenting condition prior to the time it would move on the cars to Providence, Rhode Island?

A. I wouldn't question your statement, but I can't conceive of any fermentation taking place until August the 10th, when it was unloaded.

Q. You wouldn't think it would ferment, then, when it was saturated in the hold of the ship?

(Deposition of Harry Albert Mereness.)

A. With salt water?

Q. Yes. A. No.

Q. It won't ferment with salt water?

A. I don't say it won't ferment with salt water; I say I can't appreciate fermentation taking place at the ordinary temperature of sea water in the hold of that ship.

Q. The Exhibit 13 which you examined, Mr. Mereness, was wetted with sea water and degummed; the period of time was immediately after—at least, it has been degummed, has it not?

A. That? No, it has not been degummed.

Q. Not degummed at all?

A. Partly; loosened.

Q. And loosened to the extent that you can see the fibre? A. Is that this one? [281]

Q. Yes. (Witness examines sample.)

A. In this exhibit the silk gum is entirely loosened from the fibre, but the larger part of the gum is still on the fibre, but it is entirely loose, just as you said.

Q. In loosening it—that is what you call fermentation? A. Yes.

Q. The fermentation loosens the gum from the fibre? A. Yes, absolutely.

Q. Now, as I said, this particular shipment would have to move at least seven days from the time it left Tacoma until it got to Providence in wet condition? A. Yes.

Q. And prior to that time it had been in the

(Deposition of Harry Albert Mereness.)

same saturated condition, but saturated more so, for at least fourteen days?

A. That is true enough.

Q. Now with a shipment of that kind moving, would it not be in a worse condition when it got to Providence, Rhode Island, than if it had been immediately dried at Tacoma or Seattle, or immediately washed?

A. It would have been in a poorer condition than if it had been immediately dried.

Q. Yes. Now, in relation to icing again, Mr. Mereness, isn't it a fact that nothing short of complete refrigeration would stop the fermentation from a chemist's standpoint? It would take complete refrigeration?

A. Well, I answered the question—I answered the previous question pretty completely, I thought, to the best of my knowledge, with reference to temperatures.

Q. Well, yes, just say yes or no — whether it would take complete refrigeration?

A. No, it wouldn't. It wouldn't require complete refrigeration to arrest the— [282]

Q. To arrest it entirely; we are speaking now of arresting it entirely.

A. To arrest it entirely?

Q. Yes.

A. No, it wouldn't complete to arrest it entirely.

Q. But almost so, wouldn't it?

A. My opinion was around 50° Fahrenheit.

Q. Very well.

(Deposition of Harry Albert Mereness.)

A. That is the best of my opinion.

Q. One other question in relation to the experiments which you made down there at the plant.

A. Yes, sir.

Q. I didn't quite catch what you did by way of the amount that you used and how you used it. Will you minutely tell me what you did, what you took?

A. The amount of material I used was roughly six pounds. This I wet thoroughly with sea water and wrapped it into a compact ball and tied it tightly with twine to get it compact. I first placed it in a dark, damp corner—

Q. In a room?

A. Yes, on a cement floor, brick building.

Q. In an open room?

A. Yes, fairly small room; in an open room, fairly small open room—and then allowed to dry as it would.

Q. Of its own accord?

A. Of its own accord. I examined it at the end of that period of time and found that the fibre apparently had not been attacked at all.

Q. Had not, you said?

A. Had not been — and had simply hardened. That is the effect that it had—simply hardened. I repeated the same process of [283] soaking in salt water and drying at various temperatures to and including 285° Fahrenheit.

Q. That is, you used artificial heat to dry it?

A. Yes, artificial heat. I don't know offhand

(Deposition of Harry Albert Mereness.)

how many I ran, but I know my idea was to keep on soaking and heating and heating a little higher; and the reason I didn't go higher than 285°, I couldn't get gas burners enough under the oven to push it up, to heat it higher than that. The final result of these tests left a dry, darkened and hardened fibre. Of course, I was running those to find out if I could cause a spontaneous combustion in any stage of the drying from completely wet to completely dry.

Q. In the first experiment, Mr. Mereness, did you know the rise in temperature? That is the one where you had the ball in the corner and allowed it to dry of its own accord.

A. In this particular case I didn't, because I didn't look for it, because it has been my experience that there is a heating in any kind of fermentation process of that kind, and I wasn't looking for it at all.

Q. Have you ever known or had experience in nitrogenous matter heating to the extent that it would burn or char or flame?

A. Have you any particular substance in mind, or just—

Q. Yes, a raw hair or hay or textile wastes?

A. In my experience, no.

Mr. KORTE.—That is all.

The WITNESS.—I want to say something—

Mr. KORTE.—Another thing I just want to ask.

Q. What is the capacity of your mill down there?

A. The capacity of our mill?

(Deposition of Harry Albert Mereness.)

Q. The capacity of the National Spun Silk Company? A. Well, as is or as was?

Q. When it is running full capacity, that is what I mean—say in 1918, August 1918; a good test. [284]

A. Thirty-five thousand pounds a week, finished yarn.

Q. I have a small sample, Mr. Mereness, of No. 1—I am not certain whether it is No. 1 or No. 2; it isn't material.

A. Well, I will tell you.

Q. (Continued.) —that was saturated in sea water for, I think ten or fourteen days. Will you tell me whether or not the fibre in that has been affected if at all? (Witness examines sample.)

A. As to color, yes, but not as to strength.

Q. I am speaking just of the strength of the fibre?

A. No, not as to strength, as far as I can see. The testimony of a thing like that is a little involved, for one reason. These things vary considerably in strength. What I mean is, No. 1 steam waste is supposed to be a certain thing—

Q. Yes.

A. Well, the No. 1 steam waste that we got at certain times was stuff that years ago they would call bad.

(Envelope containing sample of No. 1 waste marked "#1 for identification. Frank H. Burt, Notary Public.")

(Sample of No. 2 in small tobacco bag marked

(Deposition of Harry Albert Mereness.)
"Defendant's Exhibit 2 for Identification. Frank H. Burt, Notary Public.")

Q. Examine Defendant's Exhibit #2 and state if the fibre in that bunch of waste silk has been affected and, if so, to what extent, if you can tell.

A. This sample seems to be considerably weaker.

Q. Can you tell the extent of it, so far as commercial purposes are concerned, as to the amount it might be weakened, or would it require you to make further experiments on it to determine it?

A. May I see the other sample again? (Examining sample marked #1 for identification.) This sample seems to be considerably weaker—

Q. Referring to #2 for identification? [285]

A. But how much a man—I couldn't say from a commercial standpoint without actually degumming it and dressing it.

Q. And determining the yield?

A. Yes, determining the yield. We go by yield entirely of those things, and it is a perfectly fair test.

Redirect Examination by Mr. LYETH.

Q. Mr. Mereness, in answer to Mr. Korte's question regarding the fermentation of the silk prior to August 10th in the condition assumed in my question and in Mr. Korte's question, did you have in mind that the silk was immersed in salt water until it had been unloaded on the dock?

A. I had assumed that that was the case.

Q. Will you state whether or not, in your opinion, during that time while the silk was immersed in

(Deposition of Harry Albert Mereness.)

salt water, fermentation would take place?

A. Could, would or did?

Q. Could or would?

Mr. KORTE.—That is in the Pacific Ocean.

Mr. LYETH.—In Puget Sound.

Mr. KORTE.—In August, 1918.

The WITNESS.—In ten days?

Mr. KORTE.—In July and August, 1918?

A. I wouldn't expect any appreciable fermentation in ten days under those conditions.

Q. What effect would the salts in sea water, in your opinion, have with respect with the starting of fermentation? Would it check fermentation or accelerate it?

A. From what I know of similar cases, I should say that the salt water would tend to check fermentation.

Q. Would the subsequent wetting down of the silk after it had been unloaded on the dock tend to check fermentation?

A. I should say it would tend to increase it.

Q. You spoke about drying the silk waste at Seattle in the bales. [286] Whether or not that could be accomplished without artificial heat in the climate that is known to exist at Seattle and Tacoma, Washington?

Mr. KORTE.—In July and August, 1918.

Q. In August, September

The WITNESS.—Outdoors or indoors?

Mr. LYETH.—In August and September.

(Deposition of Harry Albert Mereness.)

The WITNESS.—Well, which was it, outdoors or indoors?

Mr. LYETH.—Either one.

The WITNESS.—Indoors it would be perfectly possible to have dried this silk down to the ordinary moisture content of ten per cent at Seattle, Washington, at that time.

Q. Within what time?

A. It would depend entirely upon how thick you spread it.

Q. (By Mr. KORTE.) You would have to break the bales? A. Oh, yes.

Mr. LYETH.—That is what I meant.

The WITNESS.—You have got to break the bales.

Mr. KORTE.—Certainly.

Mr. LYETH.—That is what I meant.

The WITNESS.—What is your question?

Mr. LYETH.—In the bales.

The WITNESS.—Oh, we don't care anything about it if it is in the bale; let us go back, Mr. Lyeth, to that question.

Q. (By Mr. LYETH.) If in the bale, what would your answer be? A. No.

Q. Having in mind 867 bales of silk waste, can you give some idea of what floor space indoors would be required to spread it out and dry it indoors?

A How many bales?

Q. 867 bales. Just roughly. [287]

A. To dry it at one time indoors, or out if it didn't rain, I should say would take something over 225,000 square feet for the 867 bales. I had occa-

(Testimony of Fred J. Alleman.)
sion to do this thing just the other day, so that is how I got the idea.

Testimony of Fred J. Alleman, for Defendant.

And thereupon, without offering further evidence, the plaintiff rested; and the defendant, to prove the issue on his part, called as a witness FRED J. ALLEMAN, who gave the following testimony:

Q. (By Mr. KORTE.) State your full name.

A. Fred J. Alleman.

Q. What position do you hold now and did you hold in 1918 with the Milwaukee road, or the Railroad Administration at that time?

A. Freight agent at Tacoma, Washington.

Q. What was your position?

A. Freight Agent at Tacoma, Washington, including the local office and the docks.

Q. You are the head, then, of the Freight Department in the City of Tacoma and what has to do with freight at that point? A. Yes, sir.

Q. And do you have what is known as the up-town office, or the office proper? A. Yes.

Q. And where is that located in the city with reference to the docks?

A. At East 25th and D Streets, is where the freight office is located, and that is about three miles from the docks.

Q. About three miles from the docks?

A. Yes, sir.

Q. Your office proper, then, is what is known as the up-town office? A. Yes. [288]

(Testimony of Fred J. Alleman.)

Q. That includes the freight-sheds there where the trains bring in freight and take out freight?

A. Yes.

Q. And what force have you operating there?

A. I have an assistant agent and clerical forces sufficient to carry on the work.

Q. Then you have charge of the docks?

A. Yes.

Q. How many docks, if there are more than one, and where are they located?

A. There were three docks at that time in service; No. 1, No. 2 and No. 3, and they are located on what is known as the Milwaukee Channel.

Q. That is on Commencement Bay? A. Yes.

Q. And those are the docks against which the ships from sea come and unload the freight?

A. Yes.

Q. And what force have you, or did you have at that time, operating those docks?

A. I had a chief clerk at each dock in charge of the office work; sufficient clerical help to carry on that work, and also a general foreman and an assistant general foreman, and the necessary labor to carry on that work.

Q. You had a man there by the name of Cheney?

A. Yes.

Q. What was his full name?

A. Calvin R. Cheney.

Q. And what position did he hold at the docks?

A. He held a position as chief clerk.

(Testimony of Fred J. Alleman.)

Q. And what authority did he have as chief clerk? [289]

Mr. SHORTS.—I object to that question upon the ground that it is incompetent, irrelevant, immaterial and calling for a conclusion.

Mr. KORTE.—They have put in proof here from Mr. Taylor that he talked with a man by the name of Cheney.

The COURT.—I understand that. The objection may be overruled.

Q. Go ahead and define what authority he had, if any, with reference to what he had to do.

A. Mr. Cheney's work consisted—he was in charge of the office at the clerical end; with clerks under him, and had general supervision of the office.

Q. Now, beyond him, you had then what you call the Dock Foreman? A. Yes.

Q. And what were his duties?

A. The duties of the Dock Foreman were to have charge of the discharging of steamers, the loading of steamers, the unloading of cars to and from the warehouse.

Q. Where is Mr. Cheney's office and where did Mr. Cheney work in the dock, with reference to where the ship involved in this lawsuit unloaded?

A. At the extreme north end, at what is known as Dock No. 1.

Q. How far would his position, or place where he would work, be from the place where the unloading would be carried on? A. A thousand feet.

Q. Describe generally to the Court where Mr.

(Testimony of Fred J. Alleman.)

Cheney was located and where this unloading was going on.

A. Well, what is known as Dock No. 1, 960 feet long by 175 feet in width. This is north and south (illustrating) and the dock office is in the extreme northeast corner of Dock No. 1. The unloading was done at the south end of this 960-foot dock.

Q. Assuming that this piece of furniture here would represent the dock, where would Mr. Cheney's office be and where was the unloading carried on? [290]

A. On that northeast corner of that counter, and the unloading would be going on right here (pointing), assuming that there was another dock beyond there.

Q. Now Mr. Alleman, can you remember when the "Maru" ship was stranded at Cape Flattery?

A. I do.

Q. And you had information that there were cargoes on there that would have to be handled through your dock? A. I did.

Q. Were you present when the ship was first docked? A. I was.

Q. Do you remember the date when it first docked at the Milwaukee dock? A. I do.

Q. Give it, please.

A. About nine A. M. August 10th.

Q. Was that when it first came? A. Yes.

Q. And then did it stay there to unload?

A. They undertook, or rather started to unload,

(Testimony of Fred J. Alleman.)

but she took water so fast that they had to give it up.

Q. Where did it go then?

A. They took her to what is known as the Todd Drydocks.

Q. And how long did the ship stay at the Todd Drydocks?

A. Until some time during the night of August 11th.

Q. And when did it commence to unload?

A. Some time during the forenoon of August 12th.

Q. Did you go on board the steamer when it first came there, or when it started first to unload, or at any time? A. I did.

Q. Was it at the time when the ship first docked, or when it returned from the drydock that you went on board? [291]

A. More particularly after she came back from the drydock.

Q. How much time did you put in that day about the ship?

A. Oh, I would say at least an hour.

Q. Then, with reference to that time—I may not have the time in my mind exactly—but what, if any, instructions or orders did you give with reference to the damaged cargoes on the ship, so far as the taking possession of them by the railroad or the handling of them and shipping them?

Mr. SHORTS.—I object to that on the ground that it is incompetent, irrelevant and immaterial as to what instructions were given and as not binding on the plaintiff.

(Testimony of Fred J. Alleman.)

The COURT.—As I understand, the question in this case is whether the railroad ever accepted these goods for shipment.

Q. (Mr. KORTE.) What orders did you give, if any, with reference to the damaged cargo?

A. On August 10th, after the steamer had docked and started to discharge cargo, and noticing the condition of the two forward hatches, I issued instructions that under no circumstances was any part of the damaged cargo to be accepted in the warehouse.

Q. Where did you say it should be placed, if at all?

A. It was to be placed on the open space between what is known as Dock No. 1 and the Gillespie Oil Shed.

Q. After that what did you do and where did you go.

A. August 10th, do you refer to?

Q. Yes; after you gave those orders.

A. I watched the discharging for some little time and saw the condition.

Q. And was it on— A. On August 10th.

Q. On August 10th she went to the drydock, didn't she? A. Yes, but she discharged some of it.

Q. Well, go ahead.

A. I watched the discharging of some of the cargo. [292]

Q. Was any part of the silk cargo involved here at that time discharged?

A. Not that I know of.

Q. Go ahead.

(Testimony of Fred J. Alleman.)

A. After watching the discharging for perhaps three-quarters of an hour, I left and went back to my own office to carry on other business.

Q. Your duties took you to your office where your principal duties were?

A. Yes; and later in the day I was informed that the steamer had to go back to the drydock; that it was unsafe.

Q. Then when the steamer came back from the drydocks and started to unload, did you go down to observe it? A. I did.

Q. What date was it and when did you get down there?

A. Some time during the forenoon of August 12th; I am unable to state the exact time.

Q. Did you at that time observe the condition of the cargo as it was coming out of the hold of the ship? A. I did.

Q. What cargoes were first unloaded, and when did they start unloading the silk waste involved in this case?

A. The first cargo that I took particular notice of was matting, tea, rice, beans and some waste silk.

Q. What was the condition of that cargo?

Q. The entire cargo was thoroughly and completely saturated with salt water.

Q. Then did you note the silk cargo as it was being unloading.? A. To some extent, yes.

Q. Did you go up on the ship and look in the hatches at all? A. I did. [293]

Q. Tell the condition of that cargo as it was being

(Testimony of Fred J. Alleman.)

lifted out of the hold of the ship, and what condition it was in.

A. I was on board this steamer a number of times on that particular date, and I noticed that the water was only being pumped out sufficient for the men to unload the slings; and I asked the question why the men to a large extent were walking in water and handling wet cargo; that it seemed to me could have been eliminated by pumping the water more rapidly; and I was informed at that time by the men in charge of the pump that it was necessary to keep the cargo completely flooded; that due to the heat developing in the steamer—

Mr. SHORTS.—(Interposing.) I move to strike that out as hearsay.

Mr. KORTE.—I think that is part of the *res gestae,* to show what was actually going on.

The COURT.—He can tell what was going on, but not what they told him.

Q. (Mr. KORTE.) Go ahead and tell what you saw yourself with reference to the bales as they came out,—did you note whether or not they were heating? A. They were.

Q. Or were hot? A. They were.

Q. Tell their condition as they appeared to you as they came out of the hold, the first ones.

A. The bales were somewhat hot; somewhat warm, I would say; but not as warm as later on; due to the fact that they were thoroughly submerged in water.

(Testimony of Fred J. Alleman.)

Q. Did you note then the cargo as it generally came out later on?

A. I did, off and on during the entire discharging.

Q. And how were they, with reference to heating, as they got down into the bottom of the hatch?

A. As soon as the cargo was exposed to the air and the water being pumped out, the cargo would heat. [294]

Q. You then placed this cargo, where?

A. Some of the cargo was placed in this open space between Dock No. 1 and the oil-sheds. The beans and rice, almost in its entirety, were placed on scows.

Q. Did the beans and rice come out of the same hatch in which the silk was located? A. Yes, sir.

Q. And this space which you speak of between the dock and some other platform, was that in the open or under the shed? A. In the open.

Q. Now, that was the 12th that you were there?

A. Yes, sir.

Q. Did they unload the entire cargo of waste silk on the 12th or did—

A. (Interposing.) They did not.

Q. —or did it take longer? A. Yes.

Q. How long did you stay there on the 12th?

A. I was there on several occasions. I was there in the forenoon and I was there again in the afternoon.

Q. Did you see Mr. Taylor there at that time, or have any talk with him, on the 12th?

A. I didn't know Mr. Taylor, if I saw him.

(Testimony of Fred J. Alleman.)

Q. You had no talk with him on the 12th then?

A. None whatever.

Q. Then you went back to your general offices to attend to your duties again that day? A. Yes.

Q. And when did you go down there again?

A. I was again on the dock on the 13th.

Q. What time of day did you get down there on the 13th?

A. I am unable to state the exact time, but it was some time [295] during the forenoon.

Q. When you got down there what did you find with reference to the silk waste and the two refrigerator-cars?

A. There were no cars spotted at that time.

Q. On the 13th? A. When I was on the dock.

Q. How's that?

A. No cars spotted at that time.

Q. What time of day was it that you were there?

A. It was some time during the forenoon.

Q. How long did you stay there at that time?

A. Perhaps an hour.

Q. Did you go about to examine the damaged cargoes that were being unloaded? A. I did.

Q. Did you note the waste silk that was being unloaded?

A. I noticed it in the same manner that I did the other cargoes.

Q. And were any of the other cargoes heating?

A. They were all more or less heating on the platform.

Q. And did you note the character of the waste

(Testimony of Fred J. Alleman.)

silk, as to whether it was still heating?

A. It was heating.

Q. You said you were there about an hour on the 13th; did you see Mr. Taylor there at all, or anybody? A. I did not.

Q. You had no talk with him on the 13th?

A. I did not.

Q. Where did you go after you left the docks that day? A. I went back to the office.

Q. To your general office? A. Yes.

Q. To attend to your general duties?

A. Yes. [296]

Q. And when did you go back to the dock?

A. About 9.00 A. M. of the 14th.

Q. When you got down there what did you find, with reference to the waste silk?

A. When I got to the dock on the morning of the 14th I found two cars of this silk waste had been loaded. They had been opened prior to my arrival.

Q. What do you mean by opened?

A. The doors had been opened prior to my arrival, and Mr. Hennessey and Mr. Wheeldon.

Q. Who is Mr. Hennessey?

A. Mr. Hennessey is the general foreman and Mr. Wheeldon is the sub-foreman.

Q. What did they do?

A. They called my attention to the fact that these cars had been loaded on the previous afternoon and had been sealed up during the night.

Q. What do you mean by sealed up?

A. The doors had been sealed.

(Testimony of Fred J. Alleman.)

Q. By whom? A. By the Customs.

Q. And they were the dock foremen?

A. They were the dock foremen.

Q. And what were they doing to that car when you got there?

A. They were sprinkling both cars, or the contents of both cars, with water at the time that I arrived, and they called my attention to the condition of the contents. At this time the fumes and steam and heat were still coming from the doors and through the vents of the two cars.

Q. Did you examine it physically? A. I did.

Q. What did you do by way of examining it? [297]

A. I moved the bales to the side and got my hands in on all sides of a number of bales.

Q. And how were those bales heating as compared with the bales when they first came out of the hold, as you told us?

A. The heat was greatly intensified.

Q. About what temperature, or how high was the heat in Fahrenheit, in those bales when you felt of them with your hands?

A. The two cars, when I felt of them, were in excess of 135° Fahrenheit, and how much higher I can't say.

Q. What knowledge, if any, did you have that those two cars were loaded with the waste silk as you found them there that morning?

Mr. SHORTS.—I object to that as irrelevant, immaterial and incompetent, and I do not see what

(Testimony of Fred J. Alleman.)

possible bearing the knowledge of this man can have.

The COURT.—He was the man in charge of the freight office and the freight business in this city at that time.

Mr. KORTE.—That is the point; he is the only one that could bind the company.

Mr. LYETH.—I object to that statement of counsel. I trust that you are not testifying, Mr. Korte.

Mr. KORTE.—No, I am just suggesting to the Court what my point is.

The COURT.—I think he can answer the question.

(Question repeated to the witness as follows:)

Q. What knowledge, if any, did you have that those two cars were loaded with the waste silk as you found them there that morning?

A. None whatever.

Q. And the first you learned of it was when you got down there that morning?

A. When I arrived there at the dock.

Q. Then when you found them heating, as you have described, what did you do about it?

A. I immediately ordered the foreman, Mr. Hennessey, to get hold of a switch engine and pull them away from the docks, to an open [298] space where, in case of a fire, which I was afraid of, they would not endanger other property.

I also instructed the foreman to place a man in charge of a hose and to keep continually washing down the contents of those two cars until it could

(Testimony of Fred J. Alleman.)

be decided as to what was to be done with the contents.

Q. Now, what made you feel that there might be a fire result from the condition of those bales?

A. Due to the fact that I have seen uncured hay—I have seen manure piles and grain heat up to an extent of where they would char, and coming in contact with other foreign substances, creating fires.

Q. And the heating of these bales, did that or did it not act similarly to the things which you described had charred and burnt other things?

A. They certainly did.

Q. After you had pulled the cars out into the open and ordered water poured on them until it could be determined what would be done with them; what did you do?

A. It just so happened that—

Q. How is that?

A. I say, it so happened that Mr. Wilkinson—

Q. Who is Mr. Wilkinson?

A. He was the inspector of the freight-train department.

Q. From where? A. From Chicago.

Q. And where is Mr. Wilkinson now?

A. Mr. Wilkinson died in 1919.

Q. Proceed.

A. It so happened that Mr. Wilkinson was on the docks some time later on the same date, and I said to him, "You are just the man that I want to see. We have two cars here that are extremely [299]

(Testimony of Fred J. Alleman.)

hot—that is the contents is extremely hot''—

Mr. SHORTS.—I object to this conversation with the deceased man.

Mr. KORTE.—I think the declarations are admissible. It seems to me that anything that might have been said by way of a declaration at the time would lead up to his anxiety and show his reasons for refusing them, if he did refuse them, and I think it is material.

The COURT.—He can state what Wilkinson told him to do.

The WITNESS.—What instructions?

Q. (Mr. KORTE.) What was said between you and Mr. Wilkinson as to what should be done with those two cars?

A. We talked over the situation, and he agreed with me that the silk was dangerous, or that the contents were dangerous and should not be forwarded, and we agreed between ourselves that the only authority that we would accept to forward the contents would be from Mr. Earling, the vice-president.

Q. Will you tell that over again, Mr. Alleman; I don't think counsel heard you.

A. We agreed between ourselves—

Mr. SHORTS.—Well, I want to insist on this objection. I think it is entirely objectionable testimony.

The COURT.—We admit it subject to your objection for whatever it may be worth hereafter, as this is a trial before the Court, and you can have the

(Testimony of Fred J. Alleman.)

record, of course, if it is incompetent.

Q. (Mr. KORTE.) Go ahead; what did you and Mr. Wilkinson decide upon with reference to the silk?

A. We decided that the dangers were so great that it would be entirely impracticable and wrong for us to endeavor to forward that cargo, unless it was authorized by the highest authority on the Coast, of the Milwaukee Railroad Company, which was Mr. Earling.

Q. Now, what was the general unfitness of the cargo itself, that [300] is, the silk?

A. It was very obnoxious; the fumes coming from it were very obnoxious and undesirable.

Q. And did that enter into your decision with reference to refusing the cargo?

Mr. LYETH.—Our objection to that is, that it is calling for the feelings of the witness and it is not competent testimony.

The COURT.—As I said a moment ago, this trial is before the Court and your objections are in the record and you will have the advantage of them for what they are worth hereafter. It is not necessary to be as particular as if it were being tried before a jury.

A. To some extent they did, but the prime factor I had in mind at all times was the danger to life and property due to fire.

Q. Later on, Mr. Alleman, did you find any difficulty in handling the cargo through objections on the part of the men because of its unfitness?

(Testimony of Fred J. Alleman.)

A. We did.

Q. Describe what you did with those two cars later on, with reference to the silk which had been loaded into them.

A. It must be borne in mind that we were continually watering these cars, or the contents of these cars until the 16th of August. On that day we unloaded them on the ground.

Q. Go ahead, and tell what, if any, difficulty there was in unloading that cargo by way of handling it through the men that you had.

A. We had some difficulty in getting the men to handle the contents.

Q. What objections did they make?

A. The fumes and the heating is what they objected to; but not so great at that time as we did later.

Q. This particular lot was kept wetted down every day until it was unloaded? A. Yes. [301]

Q. And then when you unloaded this from the car, where did you place it?

A. On planks that were laid on sand between the two docks—I am speaking now of Dock No. 1 and Dock No. 2—farther away from the platform than what the other wet cargo was.

Q. Now, describe how you piled those bales of silk in this car on the ground.

A. They were piled three bales each, lying flat.

Q. Had the rest of the cargo in the meantime been unloaded from the ship? A. It had.

Q. And where was that piled?

(Testimony of Fred J. Alleman.)

A. That was piled on the open platform between Dock No. 1 and the Gillespie Oil Shed.

Q. Which you have already described?

A. Yes.

Q. And what was there with reference to an oil industry or an oil shed?

A. There are several oil industries in that vicinity.

Q. How near were those piles to any one of those sheds?

A. Just a six-inch wooden wall between the open shed and the oil industry.

Q. Who were the ones operating that particular shed? A. Gillespie & Sons of New York.

Q. And what, if any, objection did they make to this particular cargo being piled up against this shed while it was there, and what reasons did they give or state to you about it?

A. I can't say just what particular objections were raised, except that they were afraid—

Mr. SHORTS.—I object to that.

The COURT.—I do not think that is very material as to what they were afraid of. [302]

Q. (Mr. KORTE.) Was there any objection because of the fear of fire?

Mr. SHORTS.—I object to that.

A. They were afraid of fire.

Q. What did you do with that cargo, with reference to moving it at any time—that cargo that was left on the platform; was it always left there or did you move that off a ways on the ground?

(Testimony of Fred J. Alleman.)

Mr. LYETH.—I object to this fashion of leading the witness.

Mr. KORTE.—I will change the question.

Q. What did you do with the remaining portion of the cargo that was piled on the platform?

A. The remaining portion that was left on the platform, which consisted of tea, matting—

Q. (Interposing.) I am speaking now of the silk cargo; what did you do with the remainder of the cargo, aside from those two cars?

A. That remained on the open platform until August 29th, and it was sprinkled with water daily.

Q. And how were they piled on that platform, with reference to depth and width?

A. Part of it was piled on ends and part of it was piled on the sides, approximately, three deep.

Q. When you speak of on end, was it one pile deep or more?

A. What I call ends is the two ends; and then the sides. As I recollect, those bales were about three feet in length.

Q. And they were piled three deep?

A. On end, one deep, and on the sides, three deep.

Q. Were you backwards and forwards there to the place while the cargo remained in that condition? A. I was backwards and forwards daily.

Q. And what did you do by way of keeping the heat down, if at all?

A. Continually kept soaking it with fresh water. [303]

Q. How's that?

(Testimony of Fred J. Alleman.)

A. We were continually soaking it with water.

Q. Every day? A. Every day.

Q. And did you note whether it was still heating?

A. It was, but not to the same degree that it did the first ten days.

Q. Did you at any time see Mr. Taylor and have a talk with him with reference to this cargo?

A. I did.

Q. When was that?

A. I am not positive. It seems to me it was about one P. M. of the 14th.

Q. Of August?

A. The 14th of August, after I had rejected the cargo. Mr. Taylor—

Q. (Interposing.) Go ahead.

A. Mr. Taylor met me on the open platform just south of Dock No. 1 and he says, "I understand you are refusing to let this cargo go forward," and I told him I had, and he tried to persuade me—telling me that there was no danger; no fire risk and that it was entirely safe for the cargo to go forward.

Q. What did you tell him?

A. I told him that from my experience and from what Mr. Wilkinson had said to me, that there was no other way that that cargo could go forward except on Mr. Earling's authority; and that pretty near ended the conversation. He asked me where he could see Mr. Earling; and that practically

(Testimony of Fred J. Alleman.)

ended the conversation; and that was the only time I had any talk with Mr. Taylor.

Q. After that talk, then what did you have to do with the cargo in the meantime, except to care for it as you were doing by sprinkling it down?

A. Nothing further. [304]

Q. When did you have anything to do again with that cargo, and under what circumstances?

A. Nothing further until on August 29th Mr. Taylor authorized or ordered us to load it into boxcars for shipment to the North Pacific Sea Products Company.

Q. Where was that located?

A. That was located in Tacoma.

Q. And then what did you do with reference to handling the cargo and loading it into the cars?

A. We started to load it into the cars at that time.

Q. What trouble, if any, did you have in trying to get it loaded, if at all?

A. The gang started to load two of the cars from the ground that had previously been loaded into the refrigerators, and after loading, perhaps, less than a third of one car, the men began to get sick and finally they positively refused to work.

Q. That gang?

A. That particular gang; and we later persuaded another gang, by allowing them some extra time, to finish the loading of those two cars.

(Testimony of Fred J. Alleman.)

Q. What difficulty did they have or experience to your knowledge?

A. They had the same difficulty; not quite as severe as the first gang.

Q. What trouble did they have by way of handling it?

A. The extreme ammonia fumes and the heat that still remained in the cars made the men sick.

Q. Then when that gang had loaded those two cars that had been unloaded from the refrigerator-cars, what other cars were loaded and by what men?

A. By the same gang that had refused to load the cars that had been previously loaded—the same gang loaded one car from the open platform without any particular difficulty. [305]

Q. Did you note the heating of the bales while they were being loaded into cars for this shipment ordered by Mr. Taylor? A. I did.

Q. Tell the Court how hot the bales were, to your knowledge. A. At this time?

Q. Yes.

A. The bales were still very hot, although not as hot as they were at the time they were unloaded from the two refrigerator-cars.

Q. Had those bales been kept wet during all of this period from the 14th to the 29th?

A. They were kept wet, and being out in the open air—

Q. And then you say you loaded the whole of the cargo into cars, and where was it taken then?

(Testimony of Fred J. Alleman.)

A. It was placed to the North Pacific Sea Products Company.

Q. And then it eventually went to Seattle, as described by Mr. Taylor? A. Yes.

Q. I think you said that certain of the other cargo, wheat and rice and beans, were loaded on scows? A. Yes.

Q. And was that stuff heating at the same time that you were examining this cargo?

A. It heated to such an extent on the scow that it charred.

Q. You spoke of your experience in connection with hay; green hay heating and setting on fire; now, describe that experience to the Court, which you have had personal knowledge of.

A. In my younger days, up to the time I was about twenty-one years of age, your Honor, I was raised on a farm, and I have at different times seen improperly cured hay heat up to such an extent that it had charred the entire inside and whenever the air reached such stacks it would blaze out. I have seen that many [306] a time. And the heating of the contents of those two cars acted in a similar manner.

Cross-examination by Mr. LYETH.

Q. Where are the manifests, Mr. Alleman?

A. In several locations; one in the Osaka Shosen Kaisha's office; that is the Steamship Company's office; and one in the Customs Office and one in Mr. Cheney's office.

(Testimony of Fred J. Alleman.)

Q. Mr. Cheney had the manifest of this particular vessel? A. Yes, sir.

Q. (Mr. KORTE.) This cargo moved in bond, did it?

The WITNESS.—Yes.

Q. (Mr. LYETH.) Why did you keep a set in Mr. Cheney's office? A. Why?

Q. Yes.

A. In order to arrange for the forwarding and the settling of accounts with the Steamship Company.

Q. You have, of course, through arrangements with the Osaka Shosen Kaisha's Company?

A. Yes.

Q. Through billing and freighting arrangements?

A. Yes.

Q. How are cars ordered to the docks?

A. How are they ordered ordinarily?

Q. Yes—physically, how is the order given?

A. The cars are ordered by the foreman, usually.

Q. Any written order?

A. Not unless they come from connecting lines.

Q. And these bales which you say were unloaded from the refrigerator-cars were not placed on the dock?

A. Not in the same location that they came from.

Q. Well, were they on the dock or were they not? [307]

A. At the time they were unloaded the second time?

(Testimony of Fred J. Alleman.)

Q. Yes.

A. That is when they were unloaded from the refrigerators?

Q. Yes.

A. No, sir; they were placed in an open space farther away from the dock, and unloaded on planking.

Q. Then they were not on the dock at all?

A. Not at that time. Originally—

Q. (Interposing.) Did you put them on the beach?

A. On the sand—by spreading planking on the sand.

Q. Well, that is on the beach; that is not on the dock at all.

A. Well, what I undertsand by the beach is the sand beach leading out to a body of water. This is not the same thing.

Q. Haven't you got a body of water there?

A. We have a body of water there, but it is confined in a channel; and where these bales were placed at the time of unloading is much higher ground that what the tide brings the water in, and we built up—

Q. (Interposing.) Was it higher that the dock itself?

A. Not higher that the dock itself but about the same level so far as the body of water is concerned.

Q. Then it was on the beach, or the sand leading to the water off the dock, was it?

(Testimony of Fred J. Alleman.)

A. That is what you might call it; yes.

Q. You spoke about the beans and the rice that were unloaded on the scows; were any of those unloaded on the dock?

A. At the start, yes, they were.

Q. Well, there were some unloaded on the dock?

A. Yes.

Q. And piled in the vicinity of the waste silk; is that true?

A. A small portion. [308]

Q. Did those take fire?

A. They didn't take fire on the dock.

Q. They charred, did they?

A. They charred on the scow.

Q. Did they char on the dock?

A. They didn't char on the dock. They were removed from the dock to the scow.

Q. The beans and the rice then on the scows took fire?

A. I would not say that they actually took fire and blazed, but they took fire to the extent that they were charred and were all dumped overboard.

Q. Did you see them charred?

A. I saw them.

Q. Where? A. On the scow?

Q. Where was that?

A. Loaded alongside the dock.

Q. They were alongside the dock? A. Yes.

Q. How were those beans and rice unloaded; were they unloaded on the dock and then on to the scows

(Testimony of Fred J. Alleman.)

or directly outside into the scows from the ship's tackle?

A. To start with, they started to discharge them on the dock, a very small portion was placed on the dock, when they brought up scows and discharged them directly from the steamer to the scows.

Q. The scows were placed outside of the steamer?

A. Outside of the steamer.

Q. Away from the dock?

A. And then they were later anchored alongside the dock.

Q. Were they tied to the dock? [309]

A. Partially tied to the dock and made fast.

Q. And you saw them charring?

A. I saw them charring.

Q. When did you see them charring or burning?

A. It was some time after the steamer had finished discharging; I could not say as to the exact date; the 16th or 17th or 18th.

Q. Somewhere between the 16th and 18th?

A. Yes.

Q. Did you go on the scows?

A. I got on the scows.

Q. You got on the scows? A. Yes.

Q. And there was a fire?

A. I could not say that it was on fire—they charred and heated to such an extent.

Q. Did they set fire to the scows?

A. They did not.

Q. Did it char the wood on the scows?

(Testimony of Fred J. Alleman.)

A. I could not say that it charred the wood on the scows.

Q. But there was char?

A. That is not what I said.

Q. I beg your pardon.

A. I said they charred.

Q. Let us get down to what you mean by charred.

A. Heating to such an extent where it will eliminate itself into ashes, and still not blaze out.

Q. Then you mean by charring, disintegrating?

A. Perhaps that is what you might call it.

Q. Then you do not say that there was a flame?

A. I didn't say there was a flame.

Q. Did they show evidences of having been burned?

A. Evidence of having burned? [310]

Q. Were they black?

A. They were blackened.

Q. Were they smoking?

A. They certainly smoked.

Q. I mean were the beans smoking; did you look at them?

A. There was very little of them left. They just charred themselves to nothing; to ashes, you might say.

Q. Then they dumped overboard a scow-load of ashes, is that it? A. Principally that.

Q. You could not recognize them as beans or rice? A. You could not.

Q. They just looked like ashes; is that it? And

(Testimony of Fred J. Alleman.)

so they dumped overboard a scow-load of ashes instead of beans and rice?

A. What were originally beans and rice.

Q. And it had gone to ashes?

A. To some extent.

Testimony of A. H. Barkley, for Defendant. L

And to further prove the issue on his part, the defendant called as a witness A. H. BARKLEY, and he gave the following testimony:

Q. (By Mr. KORTE.) What is your full name?

A. A. H. Barkley.

Q. And what position, Mr. Barkley, did you hold in August, 1918, with the Railroad Administration operating the Milwaukee roads?

A. Chief Clerk to the General Manager.

Q. Who was the General Manager?

A. Mr. H. B. Earling.

Q. And where was his office and your office?

A. In the White Building.

Q. Here in Seattle? A. Yes. [311]

Q. Do you know Mr. Taylor who testified here on the stand? A. Yes.

Q. Had you known him before August, 1918?

A. No, sir, I never saw him.

Q. When did you first meet him?

A. I think it was along about the 17th or 18th of August that he came into my office.

Q. 1918? A. Yes, sir.

Q. He came into your office? A. Yes, sir.

(Testimony of A. H. Barkley.)

Q. And what was his errand that day?

A. Why he told me of the damaged silk cargo on hand at Tacoma and of the refusal of our people to send it forward, and he was very anxious to get it removed, to get it off his hands, and he wanted to know if special arrangements could not be made to have it forwarded in some manner, and suggested that it might be loaded into refrigerator-cars and kept iced and watered down at division terminals and, possibly, messengers sent along with the cars. He was entirely willing to assume all of the expense involved in connection with such special arrangements.

Q. You went over the situation with him along those lines? A. Yes.

Q. And that is what he said?

A. I told him also that our local people at Tacoma—

Q. I didn't hear you.

A. I told him that our local people in Tacoma; our freight claim department and all our people so far as I had heard who had anything to do with the matter seemed to be opposed to handling it, and that before we could make any arrangements for forwarding we would want very positive assurance from some outside person competent to pass on such matters, to the effect that we could [312] forward this without any undue risk. Mr. Taylor dwelt considerably on his opinion of the condition of the cargo and seemed to be perfectly satisfied that

(Testimony of A. H. Barkley.)

it was safe and that our people were unduly alarmed about the heating indications. He said he was perfectly agreeable to leave it to us to make arrangements with any competent outside cargo surveyor to look the cargo over, and that he would be agreeable to abide by our refusal, in case such an outside cargo inspector considered it was unsafe, or would involve undue risk to handle it.

I told him that in case we made such an inspection he would have to stand the expense. He was perfectly agreeable to that, and he also said that if such an outside cargo surveyor conditioned his recommendations as to handling it, on taking any certain precautionary measures to safeguard the movement, that he would be entirely willing to assume any such special expense, and that in addition to anything that our own people might think was necessary.

I also told him that I was sure that our people would insist on a contract being drawn up and signed before we could move any such cargo, that would absolutely relieve us from all responsibility, and that would set out the special service and to the conditions involved.

I told him further that I had no authority to make any such special arrangements; that I was simply the Chief Clerk to the General Manager, and on his request I promised to get in touch with the General Manager and see whether he was willing to consider any such special arrangements.

(Testimony of A. H. Barkley.)

Q. And did you get in communication with Mr. Earling then?

A. I did, either that day or the following day, I am not sure which.

Q. And what did Mr. Earling say?

A. We did not get a response for a couple of days; and when we did it was to the effect that there would be no objection, providing [313] that all of the conditions that I had outlined were satisfactorily met.

Q. You outlined the same conditions to him which you have recited?

A. The same conditions I have recited, yes. And he warned me though, to make sure—

Q. What was that?

A. —to make sure that the cargo was thoroughly inspected, and that all precautionary measures which we considered necessary were taken.

Q. Then, after you heard from Mr. Earling, as you relate, what did you do after that?

A. Well, I think I got that word about the 21st and I immediately phoned Mr. Taylor's office. He was not in. I left a call and he came in some time during the day and we discussed the matter. I told him what Mr. Earling had said; that there would be no objection to going ahead with the negotiations looking toward handling the cargo on the basis of the conditions we had previously discussed. As a matter of fact, I think we had discussed them in the meantime. He had been in to

(Testimony of A. H. Barkley.)

see me to see if we had got word back. I reminded him of his agreement to abide by our refusal to handle in case any outside cargo inspector were selected considered that it was unsafe, or would involve undue risk, and I told him that he would not only have to assume the expenses of the inspection, but in case such outside surveyor did consider it was safe to handle it and outlined any special precautionary measures to safeguard the movement that he would have to take care of that expense as well as any arrangements our own people thought might be necessary. Also that he would have to execute a liability release; all of which he was perfectly willing to do.

Q. And what, if anything, was said or done about determining the legality of that transaction? [314]

A. I did not do anything at that time. We had not got along to the preparation of any such agreement, that would depend on the details of the arrangements, and I did not think it was necessary.

Q. After you told Mr. Taylor that, what did you do?

A. Later on that same day I tried to get in touch with Mr. Williams, our real estate tax agent, who handles insurance matters, but I did not get hold of him until later in the afternoon, as I recall it. I told Mr. Williams of my negotiations with Mr. Taylor. I asked what he thought about consulting Balfour-Guthrie & Company as to making a selection.

(Testimony of A. H. Barkley.)

Q. Who were Balfour-Guthrie & Company?

A. They are large cargo handlers. They handle cargoes from all parts of the world—as to making a selection of a disinterested cargo surveyor to make the examination. Mr. Williams agreed with me that Balfour-Guthrie & Company would be a good concern to consult with respect to employing or selecting such an outside cargo surveyor. I asked him to get in touch with them immediately. I think he reported to me on the following day that he had consulted them that afternoon. That was the afternoon of the 21st. On the 22d, in the morning, he came into my office and showed me a copy of a letter he had written Balfour-Guthrie & Company confirming that verbal request. I immediately phoned to Mr. Taylor's office, and he was out again and I left word. He came in sometime later during that day, I cannot recall just when.

Q. Who did?

A. Mr. Taylor. I cannot recall just exactly the hour, but some time later that same day he came in in response to the call I had left in the morning. I told Mr. Taylor the arrangement we had made with Balfour-Guthrie & Company to have an outside cargo surveyor make the inspection, and that the surveyor selected was Lloyd's agent at Seattle. I told him that Lloyd's agent had [315] either gone over that morning or was going that day, anyway, to Tacoma, and that if he wanted to be on hand himself or to have a representative on hand

(Testimony of A. H. Barkley.)

when Lloyd's agent made the inspection, we would be glad to have him do so.

Q. What did Mr. Taylor say then?

A. He made no objection to the selection. About the only thing I recall that he said was that he did not know that Lloyd's had an agent or a representative here in Seattle, and he wondered who he was. I told him I did not know his name. At that time his name was not told to me. Mr. Williams had merely said that Balfour-Guthrie & Company had told him that it was Lloyd's agent.

Q. Did that end the conversation you had with Mr. Taylor that day?

A. Yes, his stay was rather short.

Q. Then after that what did you do with relation to your talk with Mr. Taylor?

A. The following day—either the following day, that is, the 23d or the 24th, I am not sure which—Mr. Wilkinson came over from Tacoma to my office to talk the matter over. He had been consulted by Mr. Alleman previously; and Mr. Wilkinson told me that Mr. Ayton, Lloyd's agent, or Lloyd's representative, had examined the cargo and said that he considered it an unsafe and a risky proposition to handle; that he had not yet made his written report, but that was his verbal report made in Tacoma.

Mr. Wilkinson also told me that he was decidedly of the opinion himself that it would be a mistake to undertake to handle the cargo; that there was altogether too much risk involved, in his opinion; that he had had more or less experience with dam-

(Testimony of A. H. Barkley.)

aged cargoes and freight of various kinds. He and I then went into Mr. F. M. Dudley's office.

Q. Who is Mr. F. M. Dudley?

A. He is the General Attorney for the railroad. [316]

Q. He was at that time?

A. Yes; and we told him that—I told Mr. Dudley of my negotiations with Mr. Taylor, and Mr. Wilkinson reported Mr. Ayton's conclusion as to the fact that it would be unsafe to handle the cargo.

I also told Mr. Dudley that the suggestion as to a contract to cover this special service and the absolute liability release was mine, and I asked him if that was all right if the thing had gone through. He said no, that such a contract would have been illegal.

We then and there concluded that it would be a mistake to go any further with the arrangements or undertake to handle the cargo.

I immediately went back to my office and phoned Mr. Taylor. I think he answered the phone himself, if I am not mistaken. I told him we had definitely decided not to undertake to handle it. He called at my office later, the same day or the following day; I rather think it was the same day, and expressed considerable disappointment at our final conclusion, and wanted to know if that was the last word, and I told him so far as I was concerned it was.

He asked me if we had received the report from Lloyd's agent. I told him we had not. He wanted

(Testimony of A. H. Barkley.)

to be furnished with a copy of the report when we did get it, and I told him I would be glad to see that he got it.

Q. Did you at any time then give him a copy of that report?

A. I had not received as yet.

Q. But later?

A. Within a couple of days I got the written report and as soon as I got it I made a couple of copies and I either mailed Mr. Taylor the original or a copy, I cannot recollect which.

Q. Have you a copy of Mr. Ayton's report, as given to you by him? A. Yes, sir. [317]

Q. Will you produce it?

A. It was not given to me by Mr. Ayton; it was delivered to Mr. Williams' office, and Mr. Williams, I believe, made the delivery to me.

Mr. KORTE.—I offer that for identification as Defendant's Exhibit No. 21.

Do you object to the signature, Mr. Lyeth?

Mr. LYETH.—No, but I object to it as not the best evidence.

Mr. KORTE.—The defendant offers this in evidence as Defendant's Identification No. 21, being the written report from J. Ayton, a cargo surveyor, Lloyd's Agent, to Balfour-Guthrie & Company and transmitted to us, and the one testified to by Mr. Barkley.

Mr. LYETH.—Your Honor, I object to that as purely hearsay. The report of Lloyd's surveyor is not proper evidence.

(Testimony of A. H. Barkley.)

The COURT.—It will explain the conduct of the company and that is all.

Mr. KORTE.—That is the purpose of it.

The COURT.—And Mr. Barkley testified that the selection was made with the consent of Mr. Taylor. It will be admitted, subject to the objection.

(The report of J. Ayton, received in evidence and marked "Defendant's Exhibit No. 21." Said exhibit is transmitted to the Circuit Court of Appeals with all of the other original exhibits in the case.)

Q. Now, did Mr. Taylor, at the time when you told him of Mr. Ayton's report, and that you would send him a copy, or at any time previous to that, make any objection to Mr. Ayton's competency or anything on that line, or any objections to him personally?

A. I informed him on the 22d of the selection. As I say, his only comment was, that he did not know that Lloyd's had an agent or representative here and he wondered who he was. He did not seem to be particularly pleased with our selection, although he offered no objection.

Q. Did he at any time tell you or say to you that he wanted someone else to make that examination?

A. No, sir, he never suggested anybody. His offer was that he was [318] entirely willing to leave it to us to select some disinterested cargo surveyor to make the examination.

Q. Mr. Taylor testified here that on the 21st he had called on you and you told him that the rail-

(Testimony of A. H. Barkley.)

road had decided to forward this silk waste, and that this was on the 22d. Is that so or not—on the 21st or 22d did you at any time tell him that you had agreed to forward the freight unconditionally?

A. Never at any time. There was not at any time any discussion of forwarding the freight unconditionally. It was always under special conditions.

Q. —that you have outlined?

A. Under the special conditions which I have outlined, and most of them were his own suggestions.

Q. And those are the conditions which you outlined here to the Court?

A. Exactly. He never withdrew any of those conditions or suggested any changes, or objected to any of them at any time?

Cross-examination by Mr. LYETH.

Q. (Mr. LYETH.) Where was Mr. Earling?

A. He was out on the railroad.

Q. Where?

A. I do not recall where. He was en route going East.

Q. Did you send him a telegram about this, or write to him? A. I wired him.

Q. Have you that telegram? A. No, sir.

Mr. LYETH.—I called for the production of that.

Mr. KORTE.—Yes; I will get it if we can find it, I will have a search made for it. This is an old telegram of 1918.

Mr. LYETH.—You knew about this suit at the time, a long time ago.

(Testimony of A. H. Barkley.)

Q. Did you receive a telegram back from him?

A. Yes, sir. [319]

Q. Have you got that? A. No, sir.

Q. Where is it? A. I cannot recall now.

Q. Did you keep a file in your office under this matter?

A. I did not; that was about my only connection with it and I did not keep any file.

Q. You have not attempted to look for it?

A. I think I made a search. I either could not find it, or I found it and turned it over to the representative of the claim department. I do not recall which now; that was a couple of years ago.

Q. You do not recall whether you looked for it or not? A. I think I did.

Q. You think you did look for it and turned it over to the claim department? A. I think so.

Q. Did you turn it over to Mr. Mortensen?

A. I think so now. It would be Mr. Mortensen.

Q. He had charge of the case.

A. He has had more to do about it than anybody else in the claim department.

Q. How long did it take to get an answer back from Mr. Earling?

A. I think about two days before we got a reply.

Mr. SHORTS.—How long?

A. About two days.

Q. (Mr. LYETH.) And you do not know where he was?

A. I do not recall where he was now.

Q. Then you got back word from Mr. Earling

(Testimony of A. H. Barkley.)

that there would be no objection to the forwarding of this cargo, didn't you?

A. On the conditions discussed in my talk with Mr. Taylor.

Q. Which you outlined to Mr. Earling in the telegram? [320] A. Yes.

Q. And then you communicated that to Mr. Taylor, didn't you? A. Yes, sir.

Q. You told him there would be no objection to forwarding it under the conditions?

A. If all the conditions outlined were satisfactorily made and if we got the liability release and everything that was agreed to.

Q. Well, he told you, didn't he, the he was perfectly willing to release the railroad of all responsibility of future deterioration?

A. That was one agreement.

Q. And he told you he would be willing to send a man along to ice it, if necessary? A. Yes.

Q. If you wanted it? A. Yes.

Q. And you told him that Mr. Earling had no objection to the cargo going forward under those conditions, didn't you?

A. We have not mentioned all of the conditions we discussed, or what he did, rather.

Q. What further was there for him to do?

A. I told you what he was willing to do, and one of the things was that he would be willing to leave to us to arrange for the outside cargo inspector to examine the cargo and he would abide by our refusal in case he held it was unsafe and risky.

(Testimony of A. H. Barkley.)

Q. You did not say anything about that to him on the 21st?

A. Yes, sir; we discussed all of the conditions.

Q. You did not discuss with him on the 21st about the cargo surveyor?

A. Yes, sir. I told him he would have to meet that condition also.

Q. He did not have anything to do about it, did he?

A. I was merely reminding him that that was one of his original offers. [321]

Q. Did you tell him who the cargo surveyor was then? A. I did not.

Q. Did you tell him what you were going to do about it?

A. I did not. I simply told him that we would have an examination made. I had not made any arrangements yet. I had only got word from Mr. Earling that day. I told him on the following morning.

Q. As soon as you got the telegram from Mr. Earling, you telephoned Mr. Taylor and he came over to your office?

A. He was not in the office then; he came sometime during the day.

Q. And did you show him Mr. Earling's telegram? A. No, sir.

Q. Did you tell him that Mr. Earling had no objection to forwarding it?

A. I told him the substance of Mr. Earling's response.

(Testimony of A. H. Barkley.)

Q. Well, then, you did tell him that the cargo would go forward under the conditions which he had outlined, didn't you?

A. If all the conditions we had agreed to were met that would be the case.

Q. I didn't ask you that. I asked you, you did tell him that the cargo would go forward under the conditions outlined? A. I answered that.

Q. Just answer my question.

Mr. KORTE.—I think he answered it.

The COURT.—I think I understand what his answer is, but if counsel does not, he may answer it again, if it is not clear to counsel.

Q. You did tell Mr. Taylor that Mr. Earling had no objection, and that the cargo would go forward under the conditions which you had discussed, did you or did you not?

A. I told Mr. Taylor—

Q. Just answer that question yes or no.

A. Please repeat it. [322]

Q. (Question repeated to the witness as follows:)

"You did tell Mr. Taylor that Mr. Earling had no objection, and that the cargo would go forward under the conditions which you had discussed, did you or did you not?"

A. I told him that Mr. Earling had—

Q. Will you answer that question yes or no?

A. Yes.

Q. Then you telephoned Mr. Williams?

A. I didn't telephone him. I tried to see him. His office is close by, and I did not get hold of him

(Testimony of A. H. Barkley.)

until later in the afternoon.

Q. When was that?

A. The same day that I talked with Mr. Taylor.

Q. Mr. Williams showed you a letter, did he?

A. Not then.

Q. The next day he showed you a letter?

A. Yes.

Q. Where is that letter?

A. I have a copy of it?

Q. Then on the next day, that is, the 22d; is that right?

A. What do you mean by the next day?

Q. I mean the next day following your conversation with Mr. Taylor—you telephoned Mr. Taylor?

A. Yes.

Q. Again? A. Yes.

Q. And he came again to your office?

A. He did, sometime during the day; not immediately—he was not in the office.

Q. Some time during the 22d he came to your office? A. Yes. [323]

Q. Did you show him a copy of this letter to Balfour-Guthrie & Company that Mr. Williams had given you?

A. No, I don't think I did.

Q. And Mr. Taylor told you that he did not know that Lloyd's had an agent, or that Lloyd's agent had a surveyor here? A. That's it.

Q. And did he tell you that he did not know that Lloyd's agent had an office here?

A. As I recall, his comment was—it was the first

(Testimony of A. H. Barkley.)

comment he made—he did not know that Lloyd's had an agent or a representative here.

Q. He did not know that Lloyd's had an agent or representative here? A. Yes.

Q. Did you know who Mr. Taylor was?

A. He told me he represented the underwriters who had this on their hands.

Q. You had never known him before?

A. I had not.

Q. And he told you that he did not know that Lloyd's had an agent in Seattle? A. Yes.

Q. And was it at that time that you told him or made the suggestion that it would be wise for him if he wanted to have an agent or representative present at the time of the inspection— A. I did.

Q. That as on the 22d?

A. That as the 22d. I told him—

Q. Well, what did you say to him?

A. I told him if he wanted to be on hand himself or have a representative [324] there we would be perfectly agreeable and would be glad to have him do so.

Q. And you told him the day when the survey would take place?

A. I told him that Lloyd's agent had either gone over that morning or would be going over during the day.

Q. That was on the 22d? A. Yes, sir.

Q. You told him that Lloyd's agent was going over that day or the next day? Where did you get that information?

(Testimony of A. H. Barkley.)

A. I didn't say that day or the next day. I told him he had gone over that morning or was going over during the day.

Q. Had gone that morning or was going during the day? A. Yes, sir.

Q. Where did you get that information?

A. Mr. Williams gave me that.

Q. Mr. Williams gave you that? A. Yes, sir.

Q. The day before?

A. No, sir; he gave me that that morning of the 22d.

Q. When he showed you the letter he had written?

A. Yes.

Q. And the only comment Mr. Taylor made was that he did not know that Lloyd's agent had a surveyor here? A. That was all.

Q. He made no objections? A. He did not.

Q. Did you tell him at that time who this surveyor was?

A. I did not. I did not know myself. I did not have the man's name.

Q. When you heard about this survey, who told you about it?

A. I heard about it the following day, either the 23d or the 24th; I think it was the 23d. [325]

Q. Who told you about it?

A. Mr. Wilkinson.

Q. Oh, Mr. Wilkinson told you?

A. Yes, he came over from Tacoma.

Q. You had this conversation with Mr. Wilkinson, when he told you the result of the survey, and

(Testimony of A. H. Barkley.)

the conversation with Mr. Dudley, the general counsel or the attorney for the road, on the same day?

A. Yes, sir.

Q. And then you telephoned Mr. Taylor the same day? A. Yes.

Q. Did Mr. Taylor come to your office the same day?

A. I think he did; I think he came the same day or the following day.

Q. And so you cleaned it up in one day?

A. Yes; the day that Mr. Wilkinson came over, we went into Mr. Dudley's office and then I phoned to Mr. Taylor.

Q. Then what did Mr. Taylor say to you when he came over to your office?

A. After informing him of our final refusal?

Q. Yes.

A. He was decidedly disappointed and asked for a copy of the report.

Q. He asked for a copy of the surveyor's report?

A. Yes.

Q. Did you tell him who the surveyor was?

A. I forget whether I knew his name at that time or not. I do not recall.

Q. Mr. Wilkinson did not tell you his name?

A. He probably did. I am not sure. I was not very much interested in the name.

Q. He did not discuss with you at all who the surveyor was, or [326] whether he was competent, or whether he knew anything about silk

(Testimony of A. H. Barkley.)

or anything like that at that time?

A. He did not.

Q. He just said, "Mail me a copy of the report"?

A. He did not say, "Mail me a copy of the report." He asked to be given a copy of the report as soon as we had it.

Q. And he did not ask you who it was that had made the report?

A. I do not recall whether he did or not. He had had ample opportunity to find out, if he wanted to.

Q. You say he had ample opportunity?

A. He surely had. I told him we made the arrangement through Balfour-Guthrie & Company, and it was an easy matter for him to find out.

Q. You told him only that you had made arrangements with Balfour-Guthrie, and that was when?

A. When did I tell him that?

Q. Yes, when did you tell him that?

A. I told him that on the 22d.

Q. Did you tell him then that Balfour-Guthrie & Company were Lloyd's agents?

A. I did not. I simply said that we had made the arrangements through Balfour-Guthrie & Company. That we went to them—primarily I asked Mr. Williams if Balfour-Guthrie & Company would not be good people to consult with reference to the selection of such a surveyor, and he went to Balfour-Guthrie & Company and made arrangements

(Testimony of A. H. Barkley.)

through them for the Lloyd's agents to make the inspection.

Q. Then you told him—you say you told him that you made the arrangements with Balfour-Guthrie & Company, and not that Lloyd's agent would make the survey?

A. Lloyd's agent was to make the survey. The arrangement was made by Mr. Williams through Balfour-Guthrie & Company. [327]

Q. You told him that? A. I did.

Q. Did you tell him that you had made the arrangements through Mr. Williams?

A. I do not recall that detail. I probably did.

Q. And that was the time he said he did not know that Lloyds had an agent here? A. Yes.

Q. At no time then did Mr. Taylor know who this agent was, or who the surveyor was, prior to this last talk you had with him, or during that last talk?

A. What do you mean by the last talk?

Q. The time you definitely refused to forward it?

A. That is not what I said. I said I notified him on the 22d of the selection of Lloyd's agent to make the survey, and he knew on the 22d that we had made the arrangement through Balfour-Guthrie & Company to have Lloyd's agent make the survey.

Q. Don't you know that Balfour-Guthrie & Company are Lloyd's agents themselves?

Q. You do not know it now?

(Testimony of A. H. Barkley.)

A. I do not know that I do know it now.

Q. And Mr. Taylor did not question or ask you whether this surveyor that looked at the cargo knew anything about waste silk at all? A. No, sir.

Q. He did not ask you anything about that at all?

A. No, sir.

Q. Going back to the first conversation which you had with Mr. Taylor; did he suggest this surveyor, or did you? A. He did.

Q. He did? A. Yes. [328]

Q. Well, did he speak about a man who was competent to judge silk and who was experienced with silk?

A. No. He did not say competent to judge silk. He said, "A competent cargo surveyor."

Q. And that is all he said? A. Yes.

Q. And he did not say anything about a man who knew about silk?

A. No; we were talking about cargo surveyors.

Testimony of James L. Brown, for Defendant.

And, to further prove the issue on his part, the defendant called as a witness JAMES L. BROWN, who gave testimony as follows:

Q. (By Mr. KORTE.) State your full name.

A. James L. Brown.

Q. What position do you hold with the Railroad Company?

A. Assistant Superintendent of Transportation.

No. 3845

United States

Circuit Court of Appeals

For the Ninth Circuit.

6

Transcript of Record.

(IN TWO VOLUMES.)

JAMES C. DAVIS, as Director General of Railroads, Operating the Chicago, Milwaukee & St. Paul Railway and Agent Appointed Under the Transportation Acts of 1920,

Plaintiff in Error,

vs.

AMERICAN SILK SPINNING COMPANY, a Corporation,

Defendant in Error.

VOLUME II.

(Pages 385 to 663, Inclusive.)

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F. Cal.

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(Testimony of James L. Brown.)

Q. You have to do then with the movements of claims and the facilities of terminals; facilities furnished in connection with various transportations of freight on all lines? A. Yes.

Q. And have you knowledge of the running times of trains; of freight as well as passenger?

A. Yes.

Q. Do you have sufficient knowledge on the subject to know the approximate running time it would take for the movement of a passenger train between Seattle or Tacoma and Providence, Rhode Island?

A. I can answer for our own line and I can estimate beyond.

Q. Well, do that.

A. Approximately, 115 hours. [329]

Q. How many days would that be?

A. Approximately, six days.

Q. Now, what would be the approximate running time, say, taking into consideration the conditions existing in August, 1918; would you set the time the same as you do now, for a passenger train, with the was conditions existing at that time, the approximate time of the movement of that train through from Tacoma to Providence, Rhode Island?

A. The same, approximately; yes, sir.

Q. How about freight movements between those two points at that time in August, 1918?

A. I would estimate with the general conditions due to the war and the congestion existing at that

(Testimony of James L. Brown.)

time, approximately, thirty days.

Q. When I speak of passenger trains, I will ask you if you were running what is known as fast passenger service, carrying certain commodities?

A. The only trains that we run outside of our first-class passenger trains which carry other commodities, are silk trains.

Q. That is carrying what kind of silk and what conditions?

A. Raw and case silk.

Q. In its normal condition?

A. In its normal condition.

Q. Assuming that you have silk cars, and you have seen silk cars in their normal condition, and supposing that that waste silk was saturated with sea water and it was fuming and steaming and smelling badly and the shipper desired that that cargo go forward from Tacoma to Providence, Rhode Island, under certain special service, which would be sprinkling and watering down and icing in a refrigerator-car; tell the Court whether or not it would be practicable to put four of those cars into a passenger train and carry them across the continent under those conditions? [330]

A. Under the conditions stated in the question and the requirements of icing and supervising, it would be an impracticable operation. I would estimate that to sprinkle and water four cars, it would probably take an hour to each car, or a total of four hours' delay at each icing terminal.

(Testimony of James L. Brown.)

Q. Where would be your watering and icing terminals—how many between Seattle or Tacoma and Chicago?

A. They are, probably, twenty terminals between Chicago and Tacoma.

Q. In your operation of the railroad, how many cars does it require before you are entitled to have a special passenger service in a freight train?

Mr. SHORTS.—I object to that as irrelevant, immaterial and incompetent.

Mr. KORTE.—The purpose of it is to show there were only two ways that they could go; either by fastening them to a passenger train, which the witness said would be inpracticable on account of the watering and icing; the only other way would be, under the tariff which I will introduce later, that they would be entitled to fast passenger service in a freight train if they were entitled to make up a trainload.

The COURT.—All right.

Q. And how many cars does it require before a shipper is entitled to a train?

A. During the period in which this shipment moved it required a total of seven cars—or a minimum of seven cars.

Cross-examination.

Q. (By Mr. SHORTS.) Where is your office, Mr. Brown?

A. In the Stuart Building in Seattle.

(Testimony of James L. Brown.)

Q. How long have you been there with the Railroad Company?

A. I have been with the Railway Company twenty years.

Q. How long have you been out on this Coast?

A. Three years. [331]

Q. Were you here at the time this cargo was discharged?

A. No, sir; I was Assistant Superintendent of Transportation in Chicago.

Q. How many cars make up the ordinary silk train that carries silk east as these vessels are discharged?

A. Running from seven to twelve and fourteen cars.

Q. Those silk trains are still being operated, are they? A. Yes, sir.

Q. How many of those silk trains do you run East in the course of a month?

A. It all depends on the movement of silk from the Orient. Sometimes we run them once a month and sometimes twice a month.

Q. Let us take it in 1918, if you know.

A. I think an average of once a month.

Q. Of course, you know when a steamer carrying silk is due to arrive at your dock in Tacoma?

A. Yes.

Q. And you have your train made up so that you can transfer directly from ship to car?

Mr. KORTE.—This is not cross-examination, un-

(Testimony of James L. Brown.)

less it is to refresh his recollection, or unless it relates to the time it would take to transport it.

Q. (Mr. SHORTS.) Do you discharge from ship to car, or do you take the cargo out of the ship and put it in the warehouse and then load it into the cars?

A. Usually discharge from the boat to the warehouse.

Q. And after the cargo is discharged you switch your train in and then reload from the warehouse to the silk train? A. Yes.

Q. What kind of cars do you use in a silk train?

A. C. M. & St. P., or suitable refrigerator-cars insulated. [332]

Q. Take the ordinary silk train that goes East from your Tacoma wharf; what percentage of the cars are refrigerator-cars?

A. At that particular time I would say, approximately, one hundred per cent.

Q. Did you operate a silk train east for the silk cargoes discharged from the "Canada Maru" in August, 1918? A. No, sir.

Q. Was there not any silk on that cargo?

A. I believe there was, yes.

Q. Was it forwarded by silk train?

A. No, sir.

Q. How did it go forward?

A. It went forward on regular passenger train. I think it moved at the rate of about one car a day. That is silk in its normal condition.

(Testimony of James L. Brown.)

Q. So that the sound silk discharged from the "Canada Maru" went forward a carload at a time, fastened to a passenger train? A. Yes.

Q. What kind of cars were they; refrigerator-cars? A. I presume they were.

Q. Now, do I understand you that you did or did not send forward a silk train with the sound cargo from the "Canada Maru" in August, 1918?

A. To the best of my recollection there was no silk train operated between the 1st of August and the 20th of August or the 25th of August.

Redirect Examination.

Q. (Mr. KORTE.) There was one on the 29th?

A. That was from another boat.

Q. He asked you generally whether there was a silk train moved during that month. [333]

A. He did not ask the question during the month. I understood his question that he was talking about a silk special from that particular boat. We had a silk special on August 29th from Seattle.

Q. From another boat?

A. That was from another boat.

Q. Outside of that, there was no silk train over our road from any other boat? A. No.

Q. (Mr. SHORTS.) Then, if I understand you correctly, on the 29th of August, 1918, you did send the silk train from the Milwaukee Docks in Tacoma? A. Approximately twelve cars.

Mr. KORTE.—That was from Seattle.

The WITNESS.—I don't know whether it was

(Testimony of James L. Brown.)

Seattle or Tacoma. I think that all of the silk was from Seattle.

Q. (Mr. SHORTS.) All of the silk was docked from Tacoma?

A. At this particular time it was Seattle.

Q. What kind of cars made up that train?

A. I presume they were express-cars, but I can't say.

Q. (Mr. KORTE.) You speak of refrigerator-cars containing the silk that was shipped in by refrigerator-cars—you do not mean by that, or do you mean, that they are iced and that silk is iced in its normal condition?

A. No. I refer to the class of the car. Silk in its normal condition is never iced.

Q. There is no icing privilege connected with normal silk? A. No, sir. [334]

Testimony of A. L. Groves, for Defendant.

And to further prove the issues on his part, the defendant called as a witness A. L. GROVES, and he gave testimony as follows:

Q. (Mr. KORTE.) State your full name.

A. A. L. Groves.

Q. Where do you live, Mr. Groves?

A. Tacoma.

Q. What is your business?

A. Superintendent of the Philippine Vegetable Oil Company.

Q. How old a man are you? A. Fifty.

(Testimony of A. L. Groves.)

Q. Where is the Philippine Vegetable Oil Company's property located in Tacoma?

A. About 500 feet from Dock No. 1, Chicago, Milwaukee & St. Paul.

Q. Down on the tide-flats? A. Yes.

Q. And your business is superintendent of that plant, and you are around that plant practically all of the time during your working hours?

A. Yes.

Q. Do you recall when the "Canada Maru," or this Japanese ship, foundered out at Cape Flattery and came in with a lot of cargo damaged by sea-water getting into? A. Very well.

Q. And how far would you be from where they would unload or were unloading?

A. Approximately, 400 feet from our office.

Q. And do you recall this silk cargo that was being unloaded from the ship?

A. I certainly do.

Q. Did you observe it particularly so that you can speak from general knowledge of the subject?

A. I can. [335]

Q. Now I will ask you to tell the Court when you first saw the cargo being unloaded, if at all, from the hatches.

A. Well, I saw the first sling-load coming up.

Q. Do you know then the condition it was in with reference to heating or smelling and all of those things? A. Not at that time.

Q. When did you first observe the character of

(Testimony of A. L. Groves.)

the cargo with reference to heating?

A. The same day as they started to discharge, shortly after the hatches were taken off.

Q. And where were they discharging it then?

A. They started to put a load in their warehouse first and then they stopped and put it on the open space between Dock No. 1 and the oil shed of Gillespie.

Q. Did you notice the men as they were working in the hatches, or did you go up on the ship?

A. Yes, I was up on the ship every day that she was discharging.

Q. Did you note them bringing it out of the hatches, and the men down in the hatches?

A. I know they were complaining of the heat after they got down a little ways, and the smell.

Q. And did you notice the heat and the smell as it came out of the hatches? A. I certainly did.

Q. Then afterwards as the cargo was discharged and piled up there on the platform, did you observe whether it was heating or not? A. Yes, I did.

Q. Mr. Groves, give the Judge the benefit of your opinion as to how that cargo appeared to you with reference to heating; as to whether there was risk of burning or something of that kind which would make it dangerous to handle or to ship. [336]

Mr. SHORTS.—I object to that as it is not shown that this witness is competent to testify as an expert.

The COURT.—Well, if he had any experience he can state.

(Testimony of A. L. Groves.)

Mr. KORTE.—I will lead up to that. I will get his opinion now and will qualify him later.

A. I made the remark, both to the assistant foreman and to the—

The COURT.—Let him show what experience he had.

Q. What experience have you had with material catching fire spontaneously of its own accord; what have you seen in your lifetime, if you came in contact with it at all?

A. I have seen hay that was not properly cured, a large stack, burn up by some overheating; and I have seen grain heat until it charred.

Q. Now when you have seen grain heating and charring, was there or was there not a flame connected with that heating?

A. No, I never saw grain flame.

Q. You have seen it heat to the extent that it will char and burn? A. Yes.

Mr. LYETH.—He said it didn't burn.

Mr. KORTE.—No, he said it didn't flame—but it charred—it must have burned without a flame.

Q. Now, with your experience with other materials, will you tell the Court how this cargo, as it was heating, impressed you as to whether or not it would spontaneously burn and char, as you had seen other articles?

A. I would certainly not take the risk of sending anything forward.

Q. Why?

(Testimony of A. L. Groves.)

A. On account of, in my estimation, it would be a good chance for a fire.

Q. What made you think it would burn?

A. The way it was heating at the time it was discharged and afterwards.

Q. Just tell in your own general way the fear which you had of that [337] cargo burning.

A. I believe that silk placed in a tight car was liable to heat and catch fire.

Q. Where was it heating when you saw it; in an enclosed space or on the outside?

A. Outside on the dock.

Q. And how hot was it, with reference to the feeling of it, if you did at all?

A. I could not say as to the temperature, but it was hotter than I wanted to hold my hand on it.

Q. Where were those bales located which you had examined?

A. On the dock; right next to the Gillespie sheds in the open.

Cross-examination.

Q. (Mr. SHORTS.) You were on the vessel every day she was discharging? A. Yes.

Q. What were you doing there?

A. Well, the same as most people would be, rubbering, in a case like that, and then I have handled ships so many years before that, that it was only natural—

Q. Just curiosity. A. Curiosity—no business.

Q. Did you feel the bales when they first came out? A. Yes, I did.

(Testimony of A. L. Groves.)

Q. You could not keep your hand on them?

A. Well, I would not want to.

Q. You would not want to, that was all—did you put your hand on them?

A. Yes, after they were loaded in the cars next morning.

Q. Did you ever handle any silk in your business? A. For about sixteen years. [338]

Q. Did you ever see any wet silk before?

A. Not wet—raw silk.

Q. Did you ever see any wet silk waste?

A. No, not to the extent of this.

Q. Well, you don't know anything about silk or wet silk, or what it will do?

A. No, I could not swear it would catch fire, and I would not swear that it wouldn't.

Q. And all your testimony is that you say it was heating? A. That it was heating.

Q. And that is all you know about it?

A. I couldn't say that it would catch fire.

Testimony of Charles Barker, for Defendant.

And to further prove the issue on his part, the defendant called as a witness CHARLES BARKER, and he gave testimony as follows:

Q. (Mr. KORTE.) State your full name.

A. Charles Barker.

Q. How old are you, Mr. Barker?

A. Fifty-one.

Q. And what is your business?

(Testimony of Charles Barker.)

A. I am general foreman for the Pacific Stevedore Company.

Q. Of Tacoma? A. Yes.

Q. Were you such general foreman for the Pacific Stevedore Company in August, 1918?

A. Yes, but it was a different company at that time.

Q. But you were then superintending the terminal stevedoring company that was unloading the cargo from the "Canada Maru" when she docked at the Tacoma dock? A. Yes. [339]

Q. And you had to do then directly with the unloading of the cargo of this waste silk and other cargo? A. Yes.

Q. Now, to what extent was the damage to the cargoes in Hatches No. 1 and 2?

A. To what extent was it damaged?

Q. Whether they were saturated with water.

A. Yes; it was practically full of water.

Q. What was there in those hatches which you brought out?

A. Well, there was matting, tea, beans and peas and bales of waste silk.

Q. And was there any cargo of grain or rice that was submerged by the water?

A. Well, I could not say positively, but perhaps it was, or might not have been—I couldn't say absolutely whether there was rice in there or not.

Q. As you brought out the damaged cargoes, what did you do with the ones you mentioned, other than the silk waste, and where did you unload it?

(Testimony of Charles Barker.)

A. I unloaded a little of it in the dock.

Q. Where was it put then?

A. It was put between the dock and the warehouse, so far as I know.

Q. I am speaking of some of the material that was loaded on the scows afterwards; do you recall?

A. Yes.

Q. What was put on the scows?

A. There was mats and rice and beans and different grain of that kind.

Q. Did you note whether or not they were heating and burning on the scows? [340]

on, and they kept the scows pretty well wet, but

A. Well, they were smoking after they put them inside the smoke would come out. I didn't go on board to examine it.

Q. Do you know whether they burned?

A. There was heat in there on account of the smoke, and I saw several of the mats was taken out—several of the fellows went down and took them out, and the ends were burned off and they were gone, and I don't know what took place after.

Q. In your lifetime had you experience or noted or observed material that had burned without setting a match to it, what we call spontaneous combustion? A. Well, I have seen fires, yes.

Q. Have you noted any material in your lifetime that either burned without a flame, or charred?

A. Yes.

Q. And what, particularly?

A. Well, hay and manure and grain and such

(Testimony of Charles Barker.)

stuff as you would find on a farm.

Q. You were born on a farm? A. Yes.

Q. And you worked on a farm?

A. Until I was eighteen years.

Q. Can you describe any particular instance with reference to manure which you recall in your boyhood days?

A. Well, yes; several of them. I never saw them flame. I have seen them awful hot, so hot that I couldn't stand it, and when we used to lay it away in the spring, after we piled it up—

Q. Have you seen it heat to the extent that it charred?

A. Well, we once lost a pig that crawled under the pile and—

Q. Now tell that incident to the Court. [341]

A. Why, at one time I was a youngster, I guess about twelve or fifteen years old, and one of our pigs came up missing, and it was a very cold country, in the northern part of Minnesota, and the next spring when we hauled our manure away, as we generally do every year, we found the remains of this pig in the manure pile.

Q. In what condition?

A. Well, there was no flesh hardly left on him, and he was as black as though he had been burned, or something of that kind—I don't know what happened to him but he was in a very bad state.

Q. What was the condition of the manure that had surrounded the pig?

A. It was quite warm and burning.

(Testimony of Charles Barker.)

Q. And you have noted hay stacks burning up?

A. I have heard of them burning up. I never saw one. But I saw them heat; especially clover and oat straw and things like that.

Q. As you were unloading this waste silk out of the hatches; what difficulty, if any, did you encounter in getting the bales out, with reference to them being too hot, and so forth?

A. Why, there was a complaint while we were discharging the silk; in fact, all of the cargoes in the hatch were mixed up and the bags were bursting from the heat and the wet, I presume—they were all broke anyway and were scattered around, and there was a complaint and they wanted to know if we could keep the water on them, and so I went to the pump man and I asked him if he would check his pumps a little and keep the water on as the men were going to quit; and I went and asked them what was the matter and they said the bales and the cargo was so warm that they could not handle it and unless someone would keep the water up,— [342]

Q. In other words, you were trying to keep the water up as near to the top of the bales as you could?

A. To keep them from pumping the water out too fast; in fact, we went down in the No. 2 and had the hose hole plugged at one time.

Q. That was not the hole that was stove in the side of the ship?

A. Oh, no, sir; there was a hole between the No. 1

(Testimony of Charles Barker.)

hatch and the No. 2, which let the water run into the other hatch.

Q. And you plugged it up to keep the water up there as high as you could? A. Yes, sir.

Q. While you were unloading it? A. Yes.

Q. And how about the stench and the fumes that came from the cargo?

A. Well, it was not very agreeable. It was a dirty smell; of course, I don't know what it consisted of—I know I didn't like it.

Q. And then as you unloaded it did you note how hot the bales were, and how they were heating?

A. Well, I don't know exactly how hot they were. They were smelling and steaming, of course, and smoking, but they piled them up on the dock.

Q. Now, with the experience which you have related with reference to material burning and heating; how did this heating of those bales compare with what you had in mind in your experience in the past? A. Practically the same.

Q. And how did that impress you, if at all, with reference to whether there might be a risk of spontaneous combustion or the burning of those bales if they were allowed to go on? [343]

A. Well, I presume they would have charred and possibly flamed. I don't know whether they would or not. Of course, as I said before, I never saw anything flame.

Q. Were you impressed that there was a risk there? A. Yes, undoubtedly there was.

(Testimony of Charles Barker.)

Q. A hazard and a danger?

A. Yes, a hazard and a danger.

Cross-examination.

Q. (Mr. SHORTS.) How long have you been in the stevedoring business? A. How long?

Q. Yes. A. For twenty-one years.

Q. And how long has your stevedoring company been doing the work for the steamers discharging at the Milwaukee dock?

A. The present company, do you mean?

Q. The one you are with now.

A. Somewhere about six months, I should judge.

Q. And how long had the previous company been doing the work?

A. Oh, about two years, I should judge, or something like that.

Q. And were you their foreman in active charge of the longshoremen who were discharging this vessel? A. Yes.

Q. Did your duties require you to be aboard of the ship at the time the cargo was being taken off?

A. Not all of the time.

Q. You were either aboard the ship or along on the wharf? A. Yes.

Q. Did you have charge of the men who were trucking the cargo on the wharf? As well as the men aboard the ship? A. No, sir. [344]

Q. Who had charge of the men on the wharf?

A. The general foreman of the wharf, Mr. Hennessey.

(Testimony of Charles Barker.)

Q. You had charge of the men on board of the ship? A. Yes.

Q. Where was this wet waste silk stowed?

A. In the after part of the No. 1 hatch, if I remember right, in the lower hold.

Q. In the after part of the lower hold?

A. Yes.

Q. Is there an upper and a lower *twin* decks in that ship, do you recollect? A. Yes.

Q. You really had three holds, then?

A. One hold, with three different compartments.

Q. How did you get at it to discharge your cargo after taking off the hatch covers—did you take all the cargo of the upper decks out, or did you go in and work down in the square of the hatch?

A. I don't remember this incident, just how we did. I don't remember whether we went into the lower hold first or not.

Q. You opened up that hatch on the 12th of August, do you recall?

A. No; I think it was—this particular hatch—it might have been—I don't exactly remember. We started it before they had the ship discharged, I know, but I don't remember just what day this particular hatch.

Q. When did the men start complainig about the smell of the cargo?

A. When we were down in the lower hold.

Q. Everything went fine then until you got to the lower hold?

A. No, sir. There was not any of it was nice

(Testimony of Charles Barker.)

or fine at all. It was all bad, nasty work, being in the steam and the smell and so forth. Of course, as we got down it stunk more. [345]

Q. Did you have any trouble from the men at all until you got down to the water—all this cargo in No. 1 hatch was not under water?

A. No, sir, in the lower hold. There was a little water, I believe, in the 'tween-decks; I am not positive. It was before we got to the water we had the complaints. After we got to the water we didn't have much complaints.

Q. Do you know whether or not the beans and rice and tea and mustard seed and other cargo in this hatch was water-soaked?

A. Why, it was in the water and was swollen, I presume. It was soaked with water.

Q. As a matter of fact, the sacks and the coverings had burst? A. Yes.

Q. So that this stuff was all loose? A. Yes.

Q. How did you get this stuff out—in buckets?

A. No, sir, we used a net sling, if you know what that is.

Q. Yes.

A. —with a tarpaulin, or a mat, or something like that.

Q. You just threw a tarpaulin over the net sling and scooped the stuff in?

A. Yes, sir, used it as a mat.

Q. That stuff was all mixed up together and heating and steaming and smelling?

A. Everything.

(Testimony of Charles Barker.)

Q. So you had that condition to contend with before you ever got down to the wet silk?

A. I think that the grain was stored forward and the silk was stored in a separate section aft. It was all built up in the same hatch but stored in different places.

Q. When you opened up the hatch did you work cargo in the square in the hatch until you got down to the silk, or did you take the cargo in the wings as well as in the square of the hatch? [346]

A. I don't remember. Of course, after we got down to the lower hold we would take everything as it came down there, but before we got down there I don't remember whether we discharged the 'tween-decks on that particular day or not——we usually do.

Q. How did you take the bales of wet silk out of the hold? A. In a rope-sling.

Q. How many bales at a time?

A. Six generally.

Q. A good deal like you would handle a bale of hay? A. Yes.

Q. Sling them over alongside the ship and truck them away? A. Yes.

Q. Did you ever handle any wet silk before?

A. Yes, sir. I dropped a couple of loads overboard at one time and I had to pick them up.

Q. A couple of sling loads? A. Yes.

Q. But you never took any wet silk out of a ship before?

A. Not that I know of; no, sir, that is that was damaged bad.

(Testimony of Charles Barker.)

Q. What did you do with this other cargo which you took out? A. Of No. 1?

Q. Yes, out of the No. 1 hatch. A. The grain.

Q. Yes. A. That was put on the scow.

Q. You did not pay any attention to that?

A. No; I was not aboard the scow at all at any time—at no time was I aboard the scow.

Q. As a matter of fact, you did not pay any attention to the wet silk at all—your business was to get it off?

A. I told my men to get it out of there and it didn't make any [347] difference to me, from my standpoint, whether it burned up or whether it didn't.

Testimony of F. L. Paggeot, for Defendant.

And to further prove the issue on his part, the defendant called as a witness F. L. PAGGEOT, and he gave testimony as follows:

Q. (Mr. KORTE.) State your full name.

A. F. L. Paggeot.

Q. Where do you live?

A. Tacoma, Washington.

Q. What is your business now?

A. Supercargo for the "Osaka Shosen Kaisha."

Q. And did you hold such position in August, 1918? A. Yes, sir.

Q. And you were there when this "Canada Maru" came in? A. Yes, sir.

Q. With a hole stove in her side and the cargo damaged? A. Yes.

(Testimony of F. L. Paggeot.)

Q. And do you recall the damage to the waste silk that was on board? A. Yes, sir.

Q. Have you anything to do with the shipping or the determining the fitness of material which should go forward either on ships or otherwise?

A. Only to the extent of any damaged cargo of any nature; we roll it out and turn it back to the ship.

Q. Then you do have to do with the fitness or unfitness of a cargo desiring to be shipped?

A. Yes.

Q. Do you recall when they unloaded the silk cargo from the ship? A. I do. [348]

Q. How did it appear to you with reference to heating, or did you make any examination of it?

A. When it came out of the ship it was steaming quite freely, but on account of the water in the hold I didn't notice much heat. In fact, I didn't pay much attention to the heat at that time.

Q. What do you mean by the water in the hold?

A. Well, the water came up from the damage in the bottom.

Q. To what extent was the water in the hold covering the cargo of silk?

A. Well, as I recollect, the silk was all stowed from top to bottom in the after end of the hatch and the peas and beans were forward together.

Q. What about the water?

A. I think when they started to discharge the No. 1 hatch that the top was wet. There had been

(Testimony of F. L. Paggeot.)

more water in there but it had gradually run out. They discharged that, and then there was ten or twelve feet of water, maybe four or five feet from the top of the 'tween-decks.

Q. Then the cargo had been discharged and piled up there on the platform between the two docks?

A. Yes.

Q. Do you know whether it was heating then?

A. Yes.

Q. To what extent did it appear to you to be heating; was it increasing?

A. Well, I don't think so; for the reason that they were playing water on it all of the time.

Q. How did it appear to you with reference to its fitness for shipment, as to whether there was an element of risk there in shipping that cargo if it went forward? [349]

A. If it had been left to me I would not have taken it out the other way—I would not have put it into cars, but it was the railroad and I could not say.

Q. Why wouldn't you?

A. Because it was wet and damaged.

Q. Well, what risk would there be?

A. My idea was that it would catch fire.

Q. That was the way it appealed to you?

A. Yes.

Q. Do you remember the time when it was taken away from the dock in the latter part of August?

A. No, sir, after it left the dock I lost track of it.

(Testimony of F. L. Paggeot.)

Q. Was there any disagreeable smell about handling it?

A. There was a disagreeable smell all over the forward part of the ship and all over the dock, in fact.

Q. Did you notice the bales which were loaded into the two refrigerator-cars? A. Yes, sir.

Q. While they were in the cars there? A. Yes.

Q. Did you go into the car and examine whether they were heating or not?

A. Yes, sir, after the cars were opened the next morning.

Q. And how were those bales?

A. I put my hand on it and they were very hot. That was before they played the water on it.

Q. How about the smell that came from the car?

A. It was the same smell—it was a dark fume.

Q. Did you notice the car when it was closed up as to fumes coming out from the vents?

A. No, sir, I did not. I came down and came along to the car shortly after they opened it up. [350]

Q. Did you notice any of the men while they were loading or unloading any portion of it, either from that car or to any other car?

A. No, sir, I did not.

Q. You paid no attention to that? A. No, sir.

Cross-examination.

Q. (Mr. SHORTS.) What business did you say you were engaged in? Supercargo.

Q. For what?

(Testimony of F. L. Paggeot.)

A. For the "Osaka Shosen Kaisha."

Q. That is the company that is operating the "Canada Maru"? A. Yes, sir.

Q. Do you travel on the boats?

A. No, sir; I am stationed in Tacoma.

Q. And what is your business, did you say?

A. Supercargo, superintending the loading and discharging.

Q. Well, perhaps I ought to know what a supercargo ashore is, but I do not.

A. Well, I will tell you. I have a cargo list sent down to my office giving me all the material going aboard the steamer and I arrange with the officers as to the proper stowage and I also attend to the time the boat shall work and shall not; and in discharging I watch the hatches to see that the cargo all comes out, and also take all the material in the house afterwards.

Q. Do I understand you to say that your authority supersedes that of the mate or the master of the ship in respect to the stowage and discharging?

A. No, sir; absolutely not. I confer with the mate. [351]

Q. Really your duty then is to see that the mate's orders in that respect are carried out?

A. Yes, except the loading; in some instances he doesn't know the character of the cargo and I give him my advice and experience on it.

Q. That is, the cargo into the Orient? A. Yes.

Q. Of course he, having handled the cargo from the Orient, when the ship arrives he knows more

(Testimony of F. L. Paggeot.)

about it than you? A. Yes.

Q. And you, having an understanding of the cargo that is stowed on the dock, you know more about it than he does? A. Yes.

Q. And you sort of fit together? A. Yes.

Q. And that is the reason you are on the dock and see this cargo coming out? A. Yes.

Q. You have had no experience with wet waste silk before? A. No, sir.

Q. You do not know anything about it except what you saw and learned at that time?

A. Absolutely not.

Q. You saw the bales and saw that they were steaming? A. Yes.

Q. And there was some smell coming from them?

A. Yes.

Q. And they were warm? A. Yes.

Q. And what you want the Court to understand is, that if you had a question of determining whether they should be loaded [352] in that condition in the ship that you would be opposed to such loading?

A. I would have someone else who was higher in authority pass on it.

Q. But you do not know anything about transportation by rail? A. Absolutely not.

Testimony of James Ayton, for Defendant.

And to further prove the issue on his part, the defendant called as a witness JAMES AYTON, and he gave testimony as follows:

Q. (Mr. KORTE.) Your name is James Ayton?

(Testimony of James Ayton.)

A. Yes, sir.

Q. Where do you live, Mr. Ayton?

A. West Seattle.

Q. How long have you lived here in Seattle?

A. Thirty years; going on thirty years.

Q. How old are you? A. Fifty-two.

Q. What has been your business?

A. Shipping; grain and also Cargo Surveyor for Lloyd's agents.

Q. How long have you been Cargo Surveyor?

A. I have been Cargo Surveyor I would say ten years.

Q. Before that what was your business?

A. Looking after cargoes in just the same way.

Q. So that you have been surveying cargoes how long?

A. I have been looking after cargoes for pretty near thirty years.

Q. Here on the Coast? A. On the Coast.

Q. In August, 1918, who were you working for? [353] A. For Balfour-Guthrie & Company.

Q. Do you recall the "Canada Maru" which came into the docks in Tacoma with her cargo damaged?

A. Yes.

Q. Were there any cargoes on that ship that you were surveying, other than the cargo of waste silk?

A. Well, some rice and stuff that I was supposed to survey, but that had been sold and so I did not make any report on that.

Q. You were surveying other cargo than the

A. I was called on to.

(Testimony of James Ayton.)

Q. Than the waste silk involved in this suit?

A. How is that?

Q. You were surveying other cargo than the waste silk involved in this suit? A. Yes.

Q. Now, you were asked, or sent to Tacoma, and were there to survey a cargo of waste silk that was damaged that came out of the ship, to determine whether or not there was a risk in sending it forward in its then condition? A. Yes.

Q. And I presume that it was Balfour-Guthrie & Company told you to make the survey?

A. Yes.

Q. And to report to them?

A. I reported to them.

Q. When did you make the examination?

A. I think it was around about the 23d and 24th; I am not sure; your office sent a letter to our office on the 26th—

Q. How's that?

A. Your office sent a letter to our office on the 26th, but I could not go at that time because I was very busy, but now [354] whether I went the next day I can't recall, the 23d or 24th.

Q. It was the 23d or 24th that you made the examination?

A. I made the examination on the 23d or 24th and I made the report on the 26th.

Q. Now, tell the Court just what physical examination you made of the bales of waste silk and in what condition you found them?

(Testimony of James Ayton.)

A. I went over to Tacoma and I went to the docks and I met Mr. Cheney and I showed him this letter and asked him just where the silk was that I was told to inspect. And he took me down to the dock and he showed it to me and it was lying on the ground on some planks, if I remember right between the two docks, and Mr. Cheney went back and I went over those bales carefully with my hands feeling of them, and I found them quite warm and steaming and in some cases where I put my hands down in I found that some of the bales were quite hot—you could scarcely lay your hand on them.

Q. And how much farther did you examine the entire cargo?

A. I went all over it in different places. I did not inspect every bale, but I went carefully over it and I put my hand on between wherever I could to feel, and I should say I found ten or twelve bales in that way that were quite hot.

Q. And from your examination of the bales, what conclusion did you come to with reference to the risk or danger of shipping it in that condition?

A. I came to the conclusion that it was a risky thing to ship.

Q. And what would be that risk, as it occurred to you?

A. I should be scared that it would get on fire in transit.

Q. And did you make any report then to your employer, Balfour-Guthrie & Company?

A. I did. [355]

(Testimony of James Ayton.)

Q. I will ask you if that is the report which you made, which I have marked as "Defendant's Identification No. 21." (Showing.) A. Yes.

Q. That is your signature at the bottom of it?

A. Yes.

Q. In making this examination were there any of the railway officials in any manner following you around or helping you or doing anything in connection with it? A. Not a man; none at all.

Q. You did it all by yourself?

A. I did it all by myself.

Q. And the conclusions which you came to, were they disassociated from any talk with any railroad men?

A. I never spoke to a man until after I came back.

Q. After you had made this physical examination, you did not make your written report until the 26th—in the meantime, had you informed anyone of the railroad officials with reference to your findings and conclusions, before you made your written report?

A. When I was coming off the dock I met Mr. Cheney.

Q. What did you tell him?

A. Mr. Cheney said: "What do you think of it?" I said: "I consider, Mr. Cheney, that that would be a risk to ship."

Cross-examination.

Q. (Mr. SHORTS.) You are employed by Balfour-Guthrie & Company? A. Yes.

(Testimony of James Ayton.)

Q. How long have you been in their employ?

A. This is my 30th year.

Q. They are grain shippers?

A. Grain and general merchandise shippers. [356]

Q. Has not most of your experience in cargo surveying been applied to grain?

A. Grain and burlap and beans and rice; anything that comes under my observation.

Q. Balfour-Guthrie & Company are Lloyd's agents here? A. Yes.

Q. And you are in their employ? A. Yes.

Q. What other cargo surveyors do they have?

A. None.

Q. How long have you been Cargo Surveyor?

A. I have been Cargo Surveyor with Lloyd's agents about ten years now; I can't say exactly.

Q. Have they any other surveyor besides you?

A. They had when I was away, for a while, at one time.

Q. You never saw any wet waste silk before, did you? A. No, sir.

Q. You never had any experience with it at all?

A. No, sir.

Q. What other wet cargoes have you had experience with?

A. Well, I will tell you. I had some bad wet wheat, For instance, we had a cargo of wheat come in and it was heating so bad—it was heating when it came in and we went to unload it on the dock,

(Testimony of James Ayton.)

and after they had piled it up a couple of weeks it heated so bad that we had to go and empty it out and take some of the wheat and dump it overboard it was so hot.

Q. And isn't that the most experience you have had, you have been surveying wheat and other grains as they come in in railroad cars?

A. Yes.

Q. And you have had very little to do with examining ships' cargoes?

A. And also with ships' cargoes. [357]

Q. You haven't had much to do with surveying ships' cargoes? A. I have had.

Q. Most of your business is railroad cargoes?

A. No; ships' as well as rail.

Q. Well, tell us what other wet cargoes you have handled or surveyed out of ships.

A. Burlap, rice and beans.

Q. Which you have personally surveyed?

A. Yes.

Q. Here in Seattle? A. Yes.

Q. Did you ever have any wet wool?

A. No, sir.

Q. Did you ever have any water-soaked cotton?

A. No; I never handled any wet cotton.

Q. So you never had to do with wool, cotton or silk that has been soaked in salt water?

A. No, sir.

Q. And this is your first experience?

A. This is my first experience.

(Testimony of James Ayton.)

Q. You are not appointed by Lloyd's agents as one of their surveyors—you are simply employed by Balfour-Guthrie? A. By Balfour-Guthrie.

Mr. KORTE.—As Lloyd's agent?

The WITNESS.—Yes.

Mr. SHORTS.—Now let us get this straightened out.

The WITNESS.—I am employed by Balfour-Guthrie.

Mr. SHORTS.—You are employed by Balfour-Guthrie & Company?

The WITNESS.—Yes, sir; that's it.

Mr. KORTE.—And Balfour-Guthrie & Company are Lloyd's agents?

Mr. SHORTS.—Among their many activities? [358]

Mr. KORTE.—And your employment has to do with reference to their shipments; whenever they have a survey to be made you are the one that does it?

Mr. SHORTS.—You do not mean to say, Mr. Ayton, that you are the exclusive man or the only man in the port of Seattle or of Tacoma that makes surveys for Lloyd's, do you?

The WITNESS.—Oh, no—I am a Cargo Surveyor.

Testimony of David W. Huggins, for Defendant.

And to further prove the issue on his part, the defendant called as a witness DAVID W. HUGGINS, and he gave testimony as follows:

Q. (Mr. KORTE.) State your full name.

A. David W. Huggins.

Q. How old a man are you? A. Fifty-three.

Q. What is your business?

A. I am superintendent of the L. C. Gillespie & Sons.

A. And what is its business? A. Oil importers.

Q. They have an oil plant at or near the Milwaukee docks in Tacoma?

A. On the Milwaukee property, between Docks No. 1 and 2.

Q. And they store oil on that property?

A. They do, sir.

Q. Do you remember when the "Canada Maru" came in foundered, with a cargo of waste silk and other cargoes damaged, in August, 1918?

A. Yes, sir.

Q. Do you remember when they unloaded the wet waste silk; do you remember where it was located with reference to oil warehouses?

A. Just between my warehouse and what is known as Dock No. 1.

Q. How near to your warehouse, or to your building itself was it stored? [359]

A. There was just a six-inch fire wall separating them.

(Testimony of David Huggins.)

Q. Between?

A. Between, and perhaps five or six feet—

The COURT.—Is that, the warehouse as it came out of the boat?

The WITNESS.—Yes, sir.

Q. And as that waste silk was stored there, did you notice whether it was heating or not?

A. I did.

Q. It was there for quite awhile, was it not?

A. Yes, sir.

Q. And while it was there, Mr. Huggins, did you become apprehensive at all with reference to its heating condition and its proximity to your own plant with the oil? A. I did, sir.

Q. What made you apprehensive?

A. Well, I noticed that the wet silk stored there on the open dock was heating, and I feared that in time it might cause combustion, thereby endangering the stock that I had in storage.

Q. Had you during your lifetime experienced spontaneous combustion or heating from other materials? A. I did.

Q. Tell the Court what experience you have had along that line that aroused your suspicions of this particular material heating and of its combustion.

A. More particularly with corn.

The COURT.—Corn?

A. Yes, sir. I at one time was connected with the Wholesome Food Store, and they would bring corn in from the East, and particularly in the ger-

(Testimony of David Huggins.)

minating season in the Spring this corn would so heat that it would char. It would be loaded in bulk in boxcars. [360]

Q. And what fear would there be from the charring with reference to setting fire?

A. Well, the heat—if there is enough heat there to char, in time it would cause it to bombust.

Q. And set fire to things which would be inflammable? A. In all probability.

Q. Have you noticed with reference to hay?

A. I have.

Q. What experience have you had along that line? A. Well, I was born on a farm—

Q. Yes.

A. —and we noticed that hay, particularly in the stack, if it became thoroughly saturated and then dried out, it would heat.

Q. And how did that compare with the way the silk waste was heating at this time?

A. Well, it started practically in the same way. It would steam, and if you inserted your hand into the stack it would be hot.

Q. Did you examine the bales and insert your hand in those bales? A. I did, sir.

Q. And how hot were they, by your feeling of them?

A. Well, I could not determine exactly how hot they were.

Q. With reference to your keeping your hand on it for any length of time?

(Testimony of David Huggins.)

A. They were getting quite warm; so much so that anyone interested in anything else around there would feel that there was danger.

Q. Of fire? A. Yes, sir.

Cross-examination.

Q. (Mr. SHORTS.) You say there is a six-inch wood fire wall that separates your property?

A. There are two-by-sixes nailed down flat. [361]

Q. And how high is the wall?

A. The full height of the building.

Q. How high is that building?

A. Well, I will have to approximate it—I imagine 40 feet.

Q. Are there any openings in the wall?

A. No opening at all, except what is caused by shrinkage.

Q. Did you see the wet tea that was taken out of the ship? A. Yes, sir.

Q. And how was that packed?

A. In the ordinary tea cases.

Q. In bales?

A. I can't say exactly how all of the tea was packed. I didn't pay particular attention to the tea.

Q. You did not see much tea come out of the ship?

A. I didn't pay any attention. I can't say at this time what it was.

Q. Do you know whether or not, as a matter of fact, a large quantity of this wet tea was piled up

(Testimony of David Huggins.)

against this fire wall fence, which you spoke of?

A. Well, it was not piled right up against it.

Q. Do you remember now if there was a lot of wet tea there?

A. I can't say whether it was tea or not; it was wet merchandise.

Q. And what quantity of that did you see there?

A. Well, there was considerable stuff piled up there—different merchandise.

Q. How high was it piled along this fence?

A. Do you mean along that wall?

Q. Along the wall.

A. Well, that I can't say at this time. My recollection is that it was piled up four to six feet, perhaps.

Q. The containers were still intact, so that they could be handled in piles?

A. Yes, some of them. [362]

Q. And how long a pile was it?

A. Practically the width of the dock between the two warehouses; I can't say exactly how long it is.

Q. Approximately the length?

A. Probably eighty feet—sixty or eighty feet.

Q. So that you recall now that the tea or other heated wet cargoes taken out of this ship was piled along beside this wall some 60 or 80 feet in length and 5 or 6 feet high?

A. That was not piled directly alongside the wall.

Q. How far from the wall?

A. I should imagine 6 or 8 feet.

(Testimony of David Huggins.)

Q. How long did that remain there?

A. I can't say how long it remained there. It remained there quite awhile.

Q. Do you remember whether that was hot or not?

A. No, I can't. Because they were continually working on it.

Q. You haven't any recollection as to whether it was warm or steaming or heating or smelling?

A. I know it was smelling; that I know.

Q. Did it remain there for a month or more, or two months?

A. I can't say how long they did remain there.

Q. The only thing you remember about the whole cargo then was the silk?

A. Not particularly the silk.

Q. And the other cargo?

A. The other cargo was matting, for instance. I remember that distinctly.

Q. Where was that piled with reference to your place?

A. Practically in the middle of that open space between the two docks.

Q. And how far from this fire wall which you spoke of? A. Twenty-five or thirty feet. [363]

Q. Did you have any concern about that?

A. I did.

Q. Did you feel that? A. I did.

Q. What was its condition as to being cool or warm? A. Warm.

(Testimony of David Huggins.)

Q. Warmer or cooler than the silk?

A. I can't say at this time as to whether it was warmer or cooler than the silk.

Q. Were the beans in sacks piled along there, too?

A. I can't say whether it was beans or what it was. I know there was other merchandise.

Q. And was that all warm, too?

A. I did not pay any attention to that, because it was on the opposite side.

Q. The only thing you had any apprehension about at all was the wet silk and the matting?

A. I had an apprehension at that time about the whole thing.

Q. How long did the silk remain there?

A. A portion of that silk remained there I would say from twelve to fourteen days.

Q. Now, you never have seen grain set a boxcar on fire?

A. No, sir; I never saw grain set a boxcar on fire.

Q. And you never saw hay set a boxcar on fire?

A. No, sir; I never seen it.

Q. Have you ever seen any commodity set a boxcar on fire from spontaneous combustion?

A. I never have seen it; no, sir.

Q. Have you ever seen wet wool in boxcars?

A. I have not.

Q. Or wet cotton? A. I have not. [364]

Q. Or wet cotton manufactured goods?

A. No, sir.

Q. Or wet silk manufactured goods?

(Testimony of David Huggins.)

A. No, sir.

Q. Or wet wool? A. No, sir.

Q. The substance then of your apprehension is this: that you have seen haystacks burning and knew there was such a thing as spontaneous combustion and you thought this might—

A. It might, yes—I was particularly interested in—

Q. And that is all you know about it?

A. I was particularly interested in that.

Testimony of H. Meyer, for Defendant.

And to further prove the issue on his part, the defendant called as a witness H. MEYER, and he gave testimony as follows:

Q. (Mr. KORTE.) State your name.

A. H. Meyer.

Q. Where do you live, Mr. Meyer?

A. In Seattle.

Q. How long have you lived here?

A. I think it is thirty-nine years.

Q. What is your business?

A. I am in the oil mill business.

Q. And you have charge of what is known as the Pacific Oil Mill or Oil Company?

A. The Pacific Oil Mills.

Q. That is the concern that dried waste silk in August, 1918, for Mr. Taylor of the Underwriters' Insurance Company? A. Yes, sir. [365]

Q. When that cargo came on, it came on in box-

(Testimony of H. Meyer.)

cars, didn't it? A. Yes, it arrived in boxcars.

Q. And were you there when the boxcars were opened up? A. I was.

Q. How were they heating at that time, and what difficulty did you have, if any, in getting men to unload them?

A. We had no great difficulty in getting it unloaded, except that the fumes and gases arising from the bales fermenting in the cars were so strong that the labor we had employed for that job refused to go in the cars, but we got them out—our foremen managed to get them out.

Q. You got them out?

A. They were strong—smoking.

Q. Now, when you got those bales on the ground, how did you dry them?

A. When we got them on the ground we set them up on end. We did not pile them—just set them up in one high tier on end to permit the air to circulate around so that they could cool off.

Q. Did you break the bales?

A. Then we broke the bales.

Q. All of them at one time?

A. No, sir, from time to time as we required—as we had taken in what had already been dried, and required more wet stuff to hang out, so that we broke them from time to time and from day to day.

Q. Then, as I understand you, you left the bales out in the open and then broke up what you wanted

(Testimony of H. Meyer.)

and then brought them indoors and dried it as it went in there?

A. Well, indoors and outdoors. At first we dried them outside.

Q. And then you completed the drying inside?

A. Yes, we completed the drying inside.

Q. It was, of course, raining during that period that you attempted to dry them outside?

A. Yes. [366]

Q. And you can't dry anything in the wet?

A. I won't say that—it was not raining all of the time, but it was raining part of the time.

Q. During what period of the time?

A. October, November and December.

Q. During October, was it?

A. No; I am mistaken about that. The stock must have arrived in August; I think it was August.

Q. September 29th, I think it was, was the date.

A. Was it September?

Q. September the 5th—oh, we will agree on that date. From then on, how long did you continue drying that silk? A. Until January, I believe.

Q. January of 1919? A. Yes, sir.

Q. Then finally, as you brought it indoors, how did you dry it out—what kind of apparatus did you use? A. We put in some steam coils.

Q. Where did you get them from?

A. From the North Coast Dry Kiln Company.

(Testimony of H. Meyer.)

Q. The same kind of apparatus that they dry shingles with? A. Yes.

Q. And you put them in where?

A. In the corner of our warehouse. We partitioned off a place there.

Q. And that was the final drying which you gave it before you shipped it out? A. Yes.

Q. Now, Mr. Meyer, you kept a sample of what you had dried there, didn't you, a small sample?

A. Yes. [367]

Q. About how big a bundle did you keep?

A. This is it (showing).

Q. And you gave part of that bundle to Mr. Schroeder, the Freight Claim Agent of the Railroad? A. Yes.

Q. I will show you a portion of that sample and will ask you to state to the Court whether that is part of it (showing), which you turned over to Mr. Schroeder.

A. Yes, sir, that appears to be it; I think it is.

Q. That is it? A. Yes.

Mr. KORTE.—The defendant identifies the silk waste sample as its Exhibit No. 22, identified by the witness, Meyer, and offers it in evidence.

The COURT.—That is the condition after—

Mr. KORTE.—After it was dried and shipped on, your Honor.

(Said exhibit received in evidence and marked "Defendant's Exhibit No. 22." Said exhibit is transmitted to the Circuit Court of Appeals with all the other original exhibits).

(Testimony of H. Meyer.)

Q. Have you a little portion of the silk waste after it was dried, which you washed out yourself?

A. Yes, sir.

Q. Have you got it in your pocket?

A. Yes, here it is.

Mr. KORTE.—The defendant identifies the silk waste washed out by Mr. Meyer as its Exhibit No. 23 and offers it in evidence.

(Said exhibit received in evidence and marked "Defendant's Exhibit No. 23." Said exhibit is transmitted to the Circuit Court of Appeals with all the other original exhibits.)

Q. Now, during the time that you were handling this waste silk and trying to dry it out, did you make yourself acquainted with what waste silk was and raw silk, so as to know its comparative value? [368] A. I did to a limited extent.

Q. You got an idea of what you thought the thing was worth, and do you remember making an offer to Mr. Taylor to purchase this silk from him?

A. I asked Mr. Taylor to get a price on it. I asked him to communicate to the owners that we might purchase that at $50,000.

Q. When was that with reference to this drying it out?

A. I think that was; oh, I think that would have been about November.

Q. He did not take up your offer, did he?

A. He submitted it, I believe, to New York.

Q. And what did he say in reply to that?

(Testimony of H. Meyer.)

A. I understood Mr. Taylor that they didn't reply to it.

Mr. KORTE.—Wouldn't take it?

Mr. LYETH.—That they didn't reply.

Q. (Mr. KORTE.) You got no reply — now, when did you first take in any part of the silk waste from outside into the house to dry after you got your dry kiln apparatus fixed up; what month was that, if you remember?

A. Perhaps November.

Q. About November?

A. Yes; I believe it was in November.

Q. When you first commenced to take it in the house and dry it through that process? A. Yes.

Q. Up to that date though, you had not got any part of it dried sufficient to ship it?

A. Yes; we dried some outside.

Q. About how much?

A. Well, I could not say. I suppose a carload. If I knew the dates those cars went forward to New York I could tell you.

Q. It was the 29th of November that the first carload went forward [369] —the 27th of November was the first car that went forward and December 18th was the second and January 18th was the third and January 30th was the fourth. Now, with reference to the first car that went forward on November 27th, when was it?

A. It must have been—it is quite likely that the first car was dried outside. The entire month of October that year was dry. I don't think the

(Testimony of H. Meyer.)

weather report shows a drop of rain fell during that October that season.

Q. There was no rain then up until the first carload was dry?

A. No. We had trouble with the dews.

Q. But after that the rain set in and you had to dry it inside? A. Yes.

Cross-examination.

Q. (Mr. SHORTS.) This silk came over from Tacoma in how many boxcars?

A. Four cars, as I remember.

Q. Did they all come in at the same time?

A. I think the two came in at one time, I believe.

Q. And after the arrival at your plant, you had some trouble with the Custom officials here about opening the cars?

A. I believe there was some delay.

Q. And several days, was it not, as a matter of fact, after the cars arrived at your plant, before you got authority from the Customs to open them?

A. I don't remember how long, but I know there was some delay there.

Q. Do you kow how long the bales had been in those boxcars from the time they were loaded until they were finally opened for unloading at your plant? A. Perhaps one week.

Q. It might have been more?

A. Yes, but I could not say. [370]

Q. And when you did open them, were they under Customs seals, when they came to your plant?

A. Yes.

(Testimony of H. Meyer.)

Q. When you did open the cars, the bales that were in them for a week or more, you noticed fumes coming from the bales, did you?

A. Yes, from the cars and the bales.

Q. And the bales were warm?

A. The bales were warm.

Q. Now, you say the labor that you got at that time hesitated about working there?

A. Yes; I noticed the laborers refused to go into the cars because of that ammonia smell so very strong.

Q. It was very difficult to get any labor at that time in November and December, 1918?

A. Well, we usually got them by telephoning to the free employment office.

Q. How is that?

A. We could always get labor, such as it was at that time.

Q. The fact of the matter is, that one good man in your employment did more than all of the other labor put together?

A. One man did all of the trucking off—well, he trucked most of it out—he would truck it out to the door and then they would help him.

Q. You broke those bales up from time to time and spread them out and dried the silk—did you have the cars weighed?

A. We weighed the silk as it went into the cars after we finished.

Q. Now, after you got through drying this silk in the temporary dry room which you arranged

(Testimony of H. Meyer.)

there; there was silk scattered all around the floor, more or less of it, after you got through?

A. No, not exactly; we bundled it up as we took it down and piled it up in the corner of the warehouse where we kept accumulating it after it was dried until we got a carload. [371]

Q. When did you take this sample which is in evidence here?

A. That was taken from time to time.

Q. This particular sample over here, this large bundle? A. Well, that is a number of samples.

Q. All mixed up together? A. Yes.

Q. Were those taken directly out of the bales or taken from the floor or the sweepings?

A. From various parts of the pile.

Q. (Mr. KORTE.) The opening of the cars which you speak of being sealed by the Government seal, was that up to you or to Mr. Taylor to see that they were opened?

A. Well, I suppose it was up to Mr. Taylor or the Railroad Company.

Q. It was not part of your duty—that's all.

Testimony of Joe Vice, for Defendant.

And to further prove the issue on his part, the defendant called as witness JOE VICE, and he gave testimony as follows:

Q. (Mr. KORTE.) State your full name.

A. Joe Vice.

Q. Where were you working, Mr. Vice, in August, 1918? A. With the Milwaukee.

(Testimony of Joe Vice.)

Q. What were you doing?

A. I was working in warehouse work.

Q. Down at the docks? A. Yes.

Q. You were there when this silk came off the ship?

A. Well, I was working at the house but I didn't work on the silk.

Q. Well, you handled it at one time, didn't you?

A. Yes. [372]

Q. When was it that you handled it—what did you do with reference to handling that silk?

A. Well, I helped to load it off the dock, or off the sand into the cars. We started to load the cars.

Q. Were those boxcars? A. Yes, sir.

Q. That was on the 29th?

A. Yes, somewhere along there.

Q. Loading them into the four boxcars that transported them over to Seattle? A. Yes, sir.

Q. Now, what was their condition with reference to being hot, and what difficulty, if any, did you experience in trying to handle those bales in the cars?

A. Well, they were so hot you could not hardly hold your hands between them in the pile and, of course, I was working in the car.

Q. You were inside the car?

A. I was inside the car.

Q. How did it affect you, if at all?

A. Well, it made us all sick.

Q. How did it affect you?

(Testimony of Joe Vice.)

A. Well, it made me sick.

Q. In what way; did you vomit or anything of that kind?

A. No, sir, I didn't get sick enough to vomit, but it affected our eyes, in burning them, and we loaded on a little while, and I got so sick I couldn't stand it and I says: "I am going to quit. I can't stand this." I says: "I am going out," and so I got out of the car.

Q. And you quit working?

A. I quit working. [373]

Cross-examination.

Q. (Mr. SHORTS.) What did the other men do? A. The other men followed me.

Q. Well, somebody loaded these into the boxcars, didn't they? A. Not that day; no.

Q. Do you know how these ever did get into the boxcars?

A. Why, it got in the next day or so.

Q. Did you quit the employment of the Milwaukee then that day? A. No, sir.

Q. Well, who did load this silk?

A. Well, I don't know who did load that off the sand—I don't know.

Q. You were not doing it? A. No.

Q. You know it was loaded though, don't you?

A. Yes, it was loaded.

Q. But you don't know about how or when it was loaded or who did it? A. No.

Q. Did you help to load the silk into the refrigerator-cars?

(Testimony of Joe Vice.)

A. I helped to load one or two cars off the platform, which laid between the warehouse and the oil shed.

Q. That was when you were putting it into the refrigerator-cars? A. Yes, sir.

Q. Did you help to unload that silk out of the refrigerator-cars? A. No.

Q. So that, as I understand your testimony, you helped to load the silk in the refrigerator-cars the first time it was loaded?

A. No, not the first time.

Q. Well, how many times was that loaded in the cars?

A. Well, it was loaded and then it was unloaded from the cars on the sand, part of it. [374]

Q. That is the time I am speaking about; it was loaded into the refrigerator-cars which were later unloaded on the sand. Now, did you help to load that into the refrigerator-cars?

A. The first time?

Q. Yes, the only time you had anything to do with loading the silk was when they put it into the boxcars? A. The boxcars.

Testimony of Floyd Laycock, for Defendant.

And to further prove the issue on his part, the defendant called as a witness FLOYD LAYCOCK, and he gave testimony as follows:

Q. (Mr. KORTE.) State your full name.

A. Floyd Laycock.

Q. Where were you working in August, 1918?

(Testimony of Floyd Laycock.)

A. On the Milwaukee dock, as warehouseman.

Q. Were you with Joe Vice, who just testified, at the time that this waste silk was being loaded into the boxcars? A. I was.

Q. You were in there working with him?

A. Yes.

Q. How were those bales with reference to being hot or cool; was there any difficulty in handling them?

A. Well, they were rather warm to the hand; in fact, too warm to keep your hand on there for any length of time without it would burn.

Q. Did you experience any trouble or otherwise in handling them with reference to your health?

A. Yes, sir. There was a very strong smell of ammonia, and a stinking smell of vegetables or beans or whatever it was.

Q. How did it affect you, if at all?

A. It made me sick at the stomach. [375]

Q. And what did you do? A. I threw it up.

Q. You had to vomit? A. Yes.

Q. How did it affect your eyes, if at all?

A. Well, it hurt my eyes also.

Q. How is that? A. Burned my eyes also.

Q. And were you able to continue with your work at it or did you have to quit?

A. No, sir; I quit the same time Mr. Vice quit.

Cross-examination.

Q. (Mr. SHORTS.) Did you help to load the silk in the refrigerator-cars? A. No, sir.

(Testimony of Floyd Laycock.)

Q. The first time you had anything to do with handling that was when you were trying to load it in the boxcars? A. No, sir.

Q. Did you do any of the trucking on the dock?

A. I was on the dock loading the trucks as it came from the ship.

Q. Loading the silk bales on the truck as they were discharging it on the dock from the ship's tackle?

A. When the ship first started to unload.

Q. And then the silk was taken from the tackle delivery on the docks into this open space between the warehouses? A. Yes, sir.

Q. Did you have anything to do with the silk after that until you started to load this into the boxcars? A. Not that I remember; no, sir.

Q. You and Joe Vice and who else were working on this?

A. Pete Maybo and a man named Larry Shaw. [376]

Q. The four of you boys were loading it into the boxcars?

A. We were inside the cars; yes, sir.

Q. And what day was that, Saturday?

A. The latter part of August, I don't remember the date.

Q. So when you boys quit then they got some other men to load it?

A. I expect they did—it was unloaded.

Q. Do you know whether it was eventually loaded

(Testimony of Pete Maybo.)

in the boxcars? A. No, sir.

Q. You don't know anything about that.

A. No, sir.

Testimony of Pete Maybo, for Defendant.

And to further prove the issue on his part, the defendant called as a witness PETE MAYBO, and he gave testimony as follows:

Q. (Mr. KORTE.) State your full name.

A. Pete Maybo.

Q. Were you working for the Milwaukee road in August, 1918? A. Yes, sir.

Q. And were you with Joe Vice and Floyd Laycock handling this wet silk? A. Yes, sir.

Q. Into the boxcars? A. Yes, sir.

Q. Where were you working with reference to the boxcars, outside or inside? A. Inside.

Q. And did you experience any trouble in handling the bales? A. Yes, there was.

Q. What did you experience?

A. Well, my experience was that the bale was so hot it was steaming and smoking and when we started to take the bales in by the [377] platform and we would get the bale in the cars we would drag it in with the hooks and then we would get the bale in and we had to run out and get air.

Q. How did it affect you, physically?

A. It affected me that I started to throw up.

Q. How did it affect your eyes, if at all?

A. It affected my eyes—my eyes was burning and my face was burning.

(Testimony of Pete Maybo.)

Q. Were you able to keep on with the work or did you have to quit? A. We had to quit.

Cross-examination.

Q. (Mr. SHORTS.) Did you work on this silk after that day? A. After that day?

Q. Yes.

A. We loaded a few bales. We finished up at last. But then not the same silk.

Q. Did you work on any of these wet bales before you started to put them in the boxcars?

A. No.

Q. You didn't handle it on the dock at all?

A. No.

Q. After you quit work loading the boxcars that day, did you go back to work on them the next day? A. No.

Q. Do you know whether they were loaded the next day? A. No, I don't.

Q. All you know is that you quit because you didn't like it?

A. I quit because I couldn't stand it.

Q. And they had to get somebody else to load them? A. Yes. [378]

Testimony of William D. Richardson, for Defendant.

And to further prove the issue on his part, the defendant called as a witness WILLIAM D. RICHARDSON, and he gave testimony as follows:

Q. (Mr. KORTE.) State your full name.

A. William D. Richardson.

(Testimony of William D. Richardson.)

Q. How old a man are you? A. Fifty-four.

Q. What is your business?

A. I am Chief Chemist and Chemical Engineer for Swift & Company.

Q. How long have you been Chief Chemist for Swift & Company? A. For about twenty years.

Q. And where; at what point?

A. St. Louis and Chicago.

Q. Principally at which point, of late years?

A. At Chicago.

Q. Where were you graduated, Mr. Richardson, with reference to your general education, and then with reference to your technical education as a chemist?

A. After completing my high school courses I studied at the University of Chicago from 1894 to 1899. On leaving there I went to Swift & Company in Chicago; then to St. Louis for two years, and then back to Chicago.

I have had a varied experience with different products, and have been interested and have studied for eighteen or twenty years spontaneous combustion in different materials.

Q. What materials, principally?

A. The first material that I investigated with reference to spontaneous combustion was dried blood, a produce of the packing-houses, which is used as a fertilizer.

My attention was called to this material in the first place at St. Louis about 1900. There was a car of the material which was unloaded into a

(Testimony of William D. Richardson.)

wooden warehouse; the warehouse was [379] of mill construction and had supporting posts of about 12x12 inches, and the carload of blood, which was moist and contained about 18 per cent of moisture or water, was loaded on the floor in and around those columns. It was under my observation from the time it was unloaded. After a few days I noticed that it had begun to heat and had given off ammonia fumes, and I called the superintendent's attention to it. Thereafter we watched it from time to time, following the course of its heating, but before we got ready to move it, it had heated to such an extent that it charred on the interior of the pile and had practically charred through two of those 12x12 posts around which it was piled.

As I desired to investigate the phenomenon of spontaneous combustion in this kind of material, I took some of the blood from this pile, from one edge of the pile where it was not heating and experimented on it in the laboratory. I constructed an insulated chamber with a small air tube leading to the bottom of the chamber. Into the insulated chamber I placed some of this blood and also inserted a thermometer to follow the temperature of it. But, while it heated up to a considerable extent, due to the fermentation, I never succeeded in the laboratory experiments in producing the conditions which existed in the pile. It heated to about 104° or 105°, but it did not get above that temperature, and then gradually cooled down.

Q. What other material have you had practical

(Testimony of William D. Richardson.)

experience with, that spontaneously burned or charred?

A. A little later, under somewhat similar conditions, my attention was called to a carload of tankage.

Q. What is tankage, and what kind of tankage?

A. This was packing-house tankage, which is a by-product of the packing industry, and consists of the dried residue from the rendering tanks. All of the nonedible parts of the carcass, off the animal body, except the manure, are put into rendering tanks in [380] order to render out the fat. The fiber and tissue settles to the bottom of the tanks, and those materials are taken out and dried, and constitute the tankage of commerce. It was tankage of that sort which was unloaded into the warehouse. And this tankage also was too wet; it began to heat and gave off ammonia fumes and finally, before it could be removed and redried, underwent charring itself and also charred some of the wooden columns of the warehouse. Of course, both the blood and the tankage that I have described contain more water than—

Q. More what?

A. More water, or more moisture than such materials usually do contain or should contain. They had not been properly dried, and while under normal conditions in their dry state they do not easily heat up or char or glow or take fire, if they contain, when put into storage, too much moisture, or

(Testimony of William D. Richardson.)

if they become wet in any way, they are apt to heat up and make a fire.

In the case of the tankage, when the piles were broken into the material actually glowed on exposure to the air. That is, when the air reached the hot portion of the pile.

I also experimented with this material—

Q. In the laboratory?

A. In the laboratory, and I have experimented from time to time as a matter of personal knowledge and interest, with materials of this sort, and in all cases when working with the materials in small quantity, while there is a rise of temperature, I have never succeeded in duplicating the exact conditions which occur, in a large mass of the material; so that I have been unable to reach the higher temperatures which I reached in a pile.

Q. What relation has the laboratory test then to spontaneous combustion?

A. As I see it, a laboratory test for spontaneous combustion must be [381] interpreted in this way: If the chemist finds a material which undergoes a fermentation with ventilation and heat, he may be sure that he is dealing with a substance which may, under suitable conditions, when stored in mass, take fire spontaneously, and any experiments in the laboratory, in my opinion, should be interpreted in that way.

So that my general conclusion in connection with porous and fibrous materials is, that when these substances of an organic nature contain a ferment-

(Testimony of William D. Richardson.)

able substance, they all are liable under suitable conditions to undergo spontaneous combustion.

Q. However, from your practical experience, in your opinion it requires a mass rather than a small quantity?

A. That is one of the primary conditions for spontaneous combustion, that the fibrous or porous material must be in mass.

Q. Then, in your judgment, a laboratory test is not an exact test and does not come anywhere near being a complete test as to whether or not organic fibrous material will spontaneously burn?

A. A laboratory test of such material suggests an indication of what may happen in the pile in the early stages, but never reaches the final stage.

Q. Now, leading up to that, explain to the Court how that is true; explain the first period, the fermentation period, and then the other period follows after, which really causes the spontaneous burning or charring or combustion.

A. In spontaneous combustion of the type I have been describing—

Q. That is in organic fibrous material?

A. Organic fibrous or porous materials, capable of undergoing fermentation—

Q. (Interposing.) And, by the way, would you include raw waste silk that is involved here as such fibrous porous material?

A. That comes within that definition.

Q. Now you may tell the Court all about it. [382]

A. In such materials if they become wet there is

(Testimony of William D. Richardson.)

first a period of fermentation. This fermentation is occasioned by micro-organisms, commonly called bacteria, in some cases assisted by mold. During the fermentation considerable heat is evolved and the material is changed, and many chemical substances are produced from it. At a more or less definite temperature, which is always below the boiling point of water, the organisms concerned are killed and thereafter they are not concerned in the heating. From that point on, under suitable conditions, the mass undergoes a further heating due to oxidation; that is to the addition to the substances of the oxygen of the air.

In other words, it is a combustion at low temperature.

There are various chemical reactions involved and various substances involved, and the precise course of this heating is not fully understood by chemists, but it is known that an absorption of oxygen from the air goes on, and that certain gases are given out from the material as the result of that absorption; that the heat rises to a certain point where charring and glowing occur and thereafter, depending on conditions, such as access of air and the size of the pile, it may or it may not be entirely consumed and it may or may not burst into flames, depending on the nature of the matter. The combustion may take the form of mere charring and glowing, such as often observed in refuse heaps, where no actual flame is concerned.

Q. What danger is there in the material, where

(Testimony of William D. Richardson.)

it merely chars, with reference to having it about other material that is inflammable?

A. If such material undergoing spontaneous combustion of that sort is in contact with an inflammable material it will naturally set fire to such inflammable material.

Q. Such as wood? A. Such as wood, yes. [383]

Q. Does the occurrence of spontaneous combustion depend upon the presence of inflammable gases, or might or might not there be inflammable gases present and yet you would have spontaneous combustion?

A. Spontaneous combustion would not be dependent on the presence of combustible gases, but, as a general rule, fermentations produce more or less inflammable gases.

Q. Can you illustrate by some well known substance?

A. Well, in the fermentation of sewage and in the fermentation of the majority of nitrogenous substances—and the ones I have been speaking of are nitrogenous—this blood and the tankage and also the silk, they are also of nitrogenous substances.

In the majority of such materials under fermentation combustible gases are produced such as hydrogen, carbon monoxide and methane or marsh gas, along with noncombustible gases, such as carbon dioxide and ammonia—I will correct that, ammonia is slightly combustible, but not readily combustible.

Q. Then with relation to the ignition point con-

(Testimony of William D. Richardson.)

nected with spontaneous combustion, is that point such that you can readily determine it?

A. The ignition point is decidedly variable and depends altogether on circumstances. While the ignition point of an inflammable gas can be determined with exactitude, it has been found difficult to determine the ignition point of solids. Finely divided coal dust, for example, will ignite at a lower temperature than any known gas, and solid materials undergoing spontaneous combustion, probably, ignite at a lower temperature than any gas or any finely divided dust; the reason for this being what chemists know as the condensation of gases on the surface of the substances of such solids.

The condensation of gases on the surface of solids has the [384] same effect as though the gases were compressed by a compressor—the condensation of the solid particles densely occurs on the surface in exactly the same way as though a compressor were acting on the gases and forcing them against the solids.

Q. And now you have been in the courtroom while this case has been going on and are familiar with the substances involved? A. Yes.

Q. In line with your preliminary statement which you have made, I will ask you if you have made a study of raw waste silk, such as we have involved in this case, to determine whether or not it is subject to spontaneous combustion.

A. Well, I have made laboratory experiments of such silk waste.

(Testimony of William D. Richardson.)

Q. Will you define raw silk, as to what it is, and from then on proceed and tell the Court what you have done in order to determine the results?

A. The silk waste on which I experimented was the ordinary silk waste of commerce, and consisted chemically of a certain proportion of about two-thirds of silk fiber, or fibron, and about one-third of silk gum, the sericine.

Q. Was that No. 1 or No. 2 waste that you were given? A. It was No. 1.

Q. You received that from the Railway Company for experimental purposes?

A. Yes, sir. I received about twenty-five pounds of No. 1 silk waste for experimental purposes. I experimented with this in the manner that I usually do when investigating spontaneous combustion in the laboratory. That is, I placed it in an insulated chamber and wetted it. Into the chamber was placed a thermometer and a tube through which air could be conducted, and I experimented on the silk both with air and without air.

Without air the temperature never rose to the point that it [385] did with air; but on account of the small mass of the material worked down and the difficulty of imitating the exact conditions which I found in large piles of material, the temperature of the silk waste never rose above about from 105 to 115 degrees.

Q. Did you then, alongside of that experiment, take a known material, which to your knowledge does spontaneously burn, to determine its result com-

(Testimony of William D. Richardson.)

pared with the test which you made of the raw silk?

A. Yes. I made those experiments with a dried blood and with packing-house tankage and with garbage tankage.

Q. Those three you know will spontaneously burn?

A. All three of those under suitable conditions would undergo spontaneous combustion.

Q. And what was the result of your experiments with the laboratory tests similar to the raw waste silk test?

A. Those experiments resulted in just about the same rise of temperature as in the case of the silk waste. In the case of the garbage tankage I got a somewhat higher temperature, but the temperatures never reached a point as high as the boiling point of water, for example, the highest temperature reached in any case was about 160° Fahrenheit in the case of the garbage tankage.

Q. What do you conclude from those two sets of experiments, with reference to the waste silk involved?

A. I concluded from those experiments and from the composition and general characteristics of silk waste, that it was a substance likely to undergo spontaneous combustion under suitable conditions. Those conditions would be storage in mass, sufficient insulation and wet conditions.

Q. What is the nearest analogy to waste silk, so far as the material is concerned, that will spontaneously burn, to your knowledge?

(Testimony of William D. Richardson.)

A. Of those materials that I worked with, dried blood comes nearest [386] in composition to silk waste.

Q. In what way?

A. Silk waste is a nitrogenous material, analyzing about 19.3 ammonia in the sample I worked with. Dried blood is a nitrogenous material also and in the sample I worked with it analyzed about 17% ammonia. Both of them belong to the classes known as proteins. The silk is in a fibrous condition, with a very large surface exposed. The blood is in a granular or porous condition, but, generally speaking, they are related substances. When they ferment they both give off large bodies of ammonia.

Q. Take some other commonly known material that burns spontaneously, say, for instance, hay; how did they compare with that?

A. Hay is well known to undergo spontaneous combustion of this type. Green hay, when stored in large piles, begins with the characteristic fermentation at which the temperature may rise to a point about, let us say, 160° Fahr. But if the temperature gets higher than this, spontaneous combustion is likely to ensue. This is a matter of common knowledge in the farming districts, and it has also been investigated by different authorities.

Q. We will assume, Dr. Richardson, that there were a number of bales of waste silk, some eight hundred in number, that had been completely saturated and soaked with sea water and had been lying in sea water for fourteen days in the hold of

(Testimony of William D. Richardson.)

a ship; that when they came out of the hold of the ship they were so hot that they had to keep the bales practically submerged before they could get them out of the hatches, on account of the heat bothering the men unloading them; that when piled out in the open they were still heating and were kept wetted down, and when they were put in a boxcar or refrigerator-car they still kept on heating, became so hot that you could not keep your hand on the bale, getting, I think, as high as 130° Fahr.; [387] that they laid around for sometime and were still heating, according to the experienced men who had to do with them; what would be your opinion with reference to the shipping of that material in enclosed boxcars or refrigerator-cars, as to whether there would be a risk of spontaneous combustion, the cargo having to travel from Tacoma, Washington, to Providence, Rhode Island.

Mr. SHORTS.—I object to the question, on the ground that it presupposes conditions of fact which have not been shown to exist.

Mr. KORTE.—The facts are there, I think, as I detailed them. What fact does not exist?

Mr. SHORTS.—I do not remember any testimony that there was any 130° Fahrenheit.

Mr. KORTE.—Mr. Alleman said so. Is that the only fact?

Mr. SHORTS.—The further fact that the bales were so hot in the holds of the ship that it was necessary to keep them submerged in salt water so that the men could work on them.

(Testimony of William D. Richardson.)

Mr. KORTE.—That was the testimony of Mr. Barker.

The COURT.—There was one witness who testified to that, I think. He may answer the question.

Q. (Mr. KORTE.) Just answer that question.

A. In my opinion, under the conditions which you have named, there would be a decided risk in shipping the material.

Q. Can you give as a reason for it, anything more than what you have already said on the subject?

The COURT.—There was one condition that was not stated in that question, though, and that was the size of the bales.

Mr. KORTE.—Yes. We do not know exactly the weight of them, and there is no evidence of the exact weight.

Mr. LYETH.—133 pounds.

Mr. KORTE.—There is no evidence of it—there is no exact evidence.

The COURT.—There was something said in the trial about 133 pounds.

Mr. KORTE.—It was assumed, but there is no evidence in the record of that. [388]

The COURT.—That may be true.

Mr. SHORTS.—And another thing; that these bales as put in the car were separated by dunnage.

Mr. KORTE.—I will add that condition—assuming that they would be piled in the cars with slats, two-by-four underneath to start with; would such a cargo be subject to spontaneous combustion, being

(Testimony of William D. Richardson.)

shipped in a closed car with no other attention paid to it?

A. In my opinion there would be considerable risk of spontaneous combustion.

Q. Now, assume further, Mr. Richardson, that they put slats in between the bales, and it was piled in the car in that way, and that en route they would sprinkle it down, or they would ice the cargo. Would that change your opinion with reference to eliminating the risk of spontaneous combustion?

A. I think I should have to take up those items separately. I will take up the slats, the sprinkling and the icing.

Q. All right.

A. As regards the placing of slats between those bales, that would make no essential difference and would add combustible material to the cargo.

Q. Why?

A. They are wood slats, I believe, are they not?

Q. They are.

A. I say it would add combustible material to the cargo—to the shipment. The spacing would make no great difference, because the entire mass would be enclosed by the car, which would tend to retain the heat, and those small air gaps would not reduce the temperature appreciably.

As regards the icing, that might affect the ends of the car—the material in contact with the iced tanks, but would hardly exert any effect on the interior of the car—I mean the central portion of the car. [389] Now as to the sprinkling, it is some-

(Testimony of William D. Richardson.)

what difficult to know just how thoroughly that would be accomplished, but the way I picture it to my mind is this; that if you sprinkle a car of that sort, the water would probably, to a certain extent, be washed off the top of the bales and over to the sides and would not penetrate uniformly into the bales, or to all parts of the cargo,—much in the same way that when a fire hose is played on the last remains of a fire, sometimes it is necessary to keep the water on it for a day or several days, because the water does not strike the exact spot. The only way to actually and thoroughly cool off a car which had become heated, would be to open the car, to take the bales out and break them open and sprinkle them and be certain that they were actually cooled down to a normal temperature.

Q. Where is your heat insulated, if at all?

A. The heat would be in the interior of the bales and also between the bales.

Q. And unless you could get the water inside to dissipate that heat you would have an accumulation there?

A. You would have an accumulation of the heat at those points?

Q. And would not the watering of that cause the cargo to heat, by reason of the insulation?

A. The water in itself, that is, the wetting itself *per se,* would only aggravate fermentation. It would be the cooling effect of the water, if any, which would reduce fermentation, and unless that cooling

(Testimony of William D. Richardson.)

effect got to the center of the heat there would be little or no cooling effect.

Q. And what would eliminate the risk, in your judgment, or take the risk away entirely from shipping that cargo that distance?

A. It is very difficult to draw the line at exactly the point where all risk would be eliminated. But one could make this [390] statement, that if the entire cargo were kept submerged in water, or if it were entirely dry, there would be no risk.

Q. Or if it were frozen?

A. Or frozen; yes, that would remove the risk absolutely.

Q. Now, add to the hypothetical question that I have stated to you, that when those bales were shipped from the Orient, assume that each bale weighed 133 pounds and was in a dry condition and they were shipped baled up similar to baled hay,—I think the evidence will show, if it has not already shown, that they were wrapped with matting and, I presume, inside that matting is paper,—what would you say then, under those conditions, as to whether or not the risk would still remain?

A. The risk would still remain, and the addition of matting would add that much more easily combustible material to the shipment.

Q. Did you find, in connection with your experiments with raw silk, any obnoxious gases or fumes that, when thrown off by a mass like in carload lots, might affect one's health or the men's health?

A. The most noticeable gas thrown out by fer-

(Testimony of William D. Richardson.)

menting silk waste is ammonia. This gas is present in a large quantity; but along with the ammonia various bad-smelling vapors come off, which are decidedly sickening and nauseating.

Q. Did you note in your experiments with the raw silk, whether or not when you dried it, after having been wet, if it was dried in the ordinary manner, that the tensile strength of the fiber would be affected at all?

A. I did not test that by the testing machine, but judging by the ordinary breaking test, it was not materially affected.

Q. Now, assuming that that cargo came on in that wet condition, Mr. Richardson, what would have been the most practical and sensible way of preserving that cargo, if it was necessary to preserve it? [391]

A. By drying it, unquestionably.

Q. And how would you proceed to dry it?

A. Well, it could be dried in a sunshiny climate in open air.

Q. But we haven't got that here.

A. And, otherwise, it should be dried by artificial heat in a drying-room or dry kiln or any chamber or tunnel provided with the ordinary means of heating by steam coils, with a suitable circulation of air.

Q. Would such artificial heating affect the fiber at all to any degree?

Mr. LYETH.—I object to that on the ground

(Testimony of William D. Richardson.)

that this witness has not showed himself to be a silk expert.

Mr. KORTE.—He doesn't have to be a silk expert if he has tested it out to know whether it would affect the fiber.

A. In the drying experiments which I conducted, as I said before, judging by the ordinary breaking test, I did not notice any difference in the strength, but I did not subject it to the crushing test with the testing machine.

Q. What is your opinion?

A. My opinion would be that there would be no appreciable weakening of the fiber. From my own judgment and general knowledge of the subject I would say that there would be less danger if dried inside than outside in the open air.

Q. There has been some testimony given here by Mr. Hook, a chemist, and I assume you heard his deposition read, and I think that I have handed you his deposition to read, with reference to his experiments.

Mr. Hook made the first test in an ice-box 18x24x30 inches—you are familiar with that experiment which he made? A. I am.

Q. Now, what have you to say about that particular test and as to what bearing it would have upon determining whether this silk [392] would not spontaneously burn?

A. It would have the significance of the usual laboratory test of that sort. It showed about the usual rise in temperature for materials which un-

(Testimony of William D. Richardson.)

dergo combustion. I am not astonished that it did not burn under those conditions, because none of the materials that I have experimented with did burn under those conditions.

Q. Did you make a similar box and then take the materials which you said would spontaneously burn and make tests under those conditions?

A. I worked with the equivalent of the insulated box.

Q. What result did you get with materials which will burn?

A. I got a usual rise of temperature—a temperature varying from 105 to 115 degrees without air, to a maximum temperature of 160° Fahrenheit with air, but in no case did I get combustion.

Q. Then he further went on and put an electric bulb in the box and some wood products over a hot plate, and this wood charred. Will you tell the Court the significance of the charring of that wood under those circumstances and what relation it had to the question involved?

A. Well, in plain language it would seem to indicate that he had proved that wood was not combustible.

Q. And we know that it is?

A. We know, as a matter of fact, it will burn. In other words, he did not have the conditions for its combustion in this apparatus or the wood would burn.

Q. He either had too much or too little oxygen?

(Testimony of William D. Richardson.)

A. I am inclined to think that he had too little air, for one condition.

Q. In that same test he said that the silk nearest to the bulb had charred; what would that fact of charring indicate?

A. That indicates that silk is a combustible material and under [393] suitable conditions it might take fire.

Q. Can you cause silk to flame like you can shavings of wood or shingles.

A. If a mass of silk is lighted by a match it burns after a fashion though not very readily. But a fact of that sort has no special significance in relation to combustion, because other materials which undergo spontaneous combustion will not ignite in that way at all. Blood, packing-house tankage and garbage tankage will not take fire even if the flame is applied on them for some time.

Q. In regard to your statement with reference to silk burning into a partial flame, according to a fashion, as you stated, has that been with the gum on or with the gum off? A. With the gum on.

Q. Well, take it with the gum off, why, of course, that would be a different condition?

A. The combustion of the two materials is not so different but what about the same phenomena would result, I think it would burn in about the same way, although I have not tried it.

Q. Mr. Hook has made another significant statement, that the heat developed by bacterial action

(Testimony of William D. Richardson.)

never reaches a dangerous degree. Now is that true?

A. Well, I would characterize that as true, but not as the whole truth.

Q. What relation has bacterial action to chemical action?

A. It is true that the temperature reached in fermentation does not reach a dangerous degree, but in spontaneous combustions of the type we have been considering, that I discussed, fermentation initiates the heating, and from the point where the fermentation leaves the heating the material is in condition for chemical heating to go on and carry it on up to the point of spontaneous combustion and ignition. [394]

Q. And that occurs in the large mass, which is necessary to bring it about?

A. That occurs always in large masses.

Q. Would you say that a carload lot of silk was a sufficiently large mass?

A. A carload is a sufficient mass.

The COURT.—How many bales in the car—there were 867 bales involved in this case.

Mr. KORTE.—A little over 200 bales in the car—in the dry state 250 bales are contained in the car.

The COURT.—There was a thousand bales in the shipment?

Mr. KORTE.—A thousand bales in the shipment.

The COURT.—And seven cars in a silk train?

Mr. KORTE.—Yes, but bear in mind, your

(Testimony of William D. Richardson.)

Honor, that there were 133 bales that were not damaged at all.

The COURT.—I understand that.

Mr. KORTE.—Leaving the balance damaged 867 bales. It would take 250 of those bales to go in one car.

The COURT.—That would be a full train?

Mr. KORTE.—No; that was the purpose of Mr. Brown's testimony, that we did not have enough to make up the full train.

The COURT.—Would not the plaintiff have the right to ask for a full train and to distribute those bales among the seven cars?

Mr. KORTE.—If there was a silk train moving at that time, he would have the right to send it on the silk train, but there was none moving and the railroad could not afford to send on four cars with an engine and caboose.

Q. Are there any well-known authorities, Mr. Richardson, which substantiate your theory and your definition and explanation and application of spontaneous combustion to the porous and fibrous materials which you have designated?

A. Yes, sir. [395]

Q. I have a few of them here which you handed to me, and if you will tell the Court what they are and what they relate to, so that you may have the benefit of them (handing books to witness).

A. As I said before, there are some of these matters of spontaneous combustion that are common knowledge and many of them have not been fully

(Testimony of William D. Richardson.)

investigated. But the spontaneous combustion, particularly of hay, has been investigated in a chemical way and—

The COURT.—(Interposing.) Under what circumstances will hay burn?

A. In considerable piles, if the temperature is allowed to get above 70 degrees centigrade.

The COURT.—Suppose a farmer takes oat hay just after it is cut with the mower, and he stacks it up absolutely green in the pile, will it burn from spontaneous combustion, regardless of the size of the stack?

A. If, when it is cut it contains sufficient moisture, it is very apt to, if it is made into a large stack.

The COURT.—How large would you say the stack ought to be—how many tons?

A. The experimental piles that have been worked on, on record, are from 10 to 13 feet high, by 13 to 16 feet across.

Q. (Mr. KORTE.) Those authorities you have there deal with that particular feature, don't they?

A. They do. These particular references are to Bruhns-le Far, technical micology. He gives a general description of the preliminary fermentation, and concludes with the statement that—

Mr. SHORTS.—Just a moment. I object to this. I object to this witness reading what somebody else wrote in a book. I do not object to his testifying to everything he knows about the matter.

Mr. KORTE.—I merely offer to prove what the

(Testimony of William D. Richardson.)

authorities hold—this witness is not testifying to these things, but merely for the [396] Court's benefit, if you desire it.

Mr. SHORTS.—I have no objection to the witness telling what he knows on the subject.

Mr. KORTE.—I think he has done that, but I merely wanted to show that what he said is supported by the authorities.

Q. Now, there was another test that needs explanation, and that is, Mr. Hook made the experiment with what is known as the Mackey Cloth Oil Tester. Will you explain to the Court first why that experiment has no bearing whatever on the subject?

A. The Mackey Cloth Oil Tester is an instrument which is used by chemists to test out certain oils which are used for oiling textile fibers. The oil is spread on a textile fiber and placed in a chamber, and the chamber is heated. Certain oils are more liable to heat than other oils, and the test is made in order to insure that the oil that is used for oiling those textile fibers is not readily subject to spontaneous combustion when placed on the textile fibers. It is not primarily an instrument for determining the spontaneous combustion of fibers, but to determine whether certain oil is suitable and safe for use in textile factories. In that case, twice as much oil is used as of textile fiber; that is, 14 grams of oil is spread on 7 grams of textile fiber; so that you have a small quantity of textile fiber thoroughly saturated with oil; and the heating and

(Testimony of William D. Richardson.)
the oxidation occurs on and in the oil and not in the fiber.

Q. I think the evidence shows that with that experiment there was some discoloration and charring; what would that indicate?

A. Of course, when the oil heated to a high temperature it might ignite itself, although in the Mackey Oil Tester it would not be as likely to, because there is not enough air supplied there, but if the temperature got hot enough the fiber would char without igniting. [397]

Q. Are there any other known materials, such as jute, hair, wool, which the books say will not spontaneously burn—do you know whether or not they do?

A. Hair will ignite spontaneously—crude hair, cattle hair from tanneries and hog hair from packing-houses piled in a mass and after undergoing fermentation, it may char and take fire. Dirty or greasy wool may also take fire, particularly, if it becomes wet. There are many other fibers of organic material which also undergo spontaneous combustion.

Q. Now, Mr. Barrier or Mr. Little, who gave their testimony here relative to the garbage tankage—they make the point that the reason for spontaneous combustion is the presence of the natural oil in the tankage. Explain to the Court whether or not that makes any difference.

A. Garbage tankage will take fire under suitable conditions whether it contains any fat or oil or

(Testimony of William D. Richardson.)

not. Ordinary garbage tankage, which is the dried residue from hotels and houses, kitchen refuse, ordinarily contains seven or eight per cent of oil or fatty material, but this oil and fatty material is recovered in sanitary garbage plants by extraction, and the extracted tankage contains less than one per cent of fatty or oily matter—just about what waste silk contains. Nevertheless, garbage tankage of that sort will ignite spontaneously in the same way that the untreated garbage tankage does.

Q. What relation or what connection has the presence or absence of an inflammable oil to spontaneous combustion?

A. It is well known among chemists that if an easily oxidizable oil, such as linseed oil or cottonseed oil or soy bean oil, or some other oil, is mixed with a fibrous or porous material, such material is very apt to heat up and make a fire. But, although that is so, it does not mean that the materials will not take fire in the absence of such oils, and in the case of garbage [398] tankage we have an excellent illustration on that point, in so far as it occurs both in tankage which contained no fat or oil and in tankage which does.

Q. It merely would add fuel to the flame?

A. It adds fuel to the fire and accelerates the heating somewhat.

Q. The fact that this raw silk was saturated with sea water and not with fresh water, would that change or eliminate or lessen the risk of spontaneous combustion? A. No, I should say not.

(Testimony of William D. Richardson.)

Q. Why not?

A. Because sea water does not inhibit fermentation; in fact, it promotes it if the micro-organisms concerned live in sea water, or they are derived from sea water, and in no case does it lessen the fermentation particularly—there is not enough salt there to do that.

Q. Another statement was also made by Dr. Little, that because of the presence of the large quantities of ammonia, that ammonia repels the fire rather than aggravates it, and therefore that helps their conclusion that spontaneous combustion could not occur in raw waste silk.

A. I think the answer to that is, that such a material as blood, which also evolves large quantities of ammonia, does take fire spontaneously. That is a fact and the other is a hypothesis.

Cross-examination.

Q. (Mr. LYETH.) You took the ordinary course at the University of Chicago?

A. Not the ordinary course.

Q. The scientific course?

A. No, sir, I spent most of my time in chemistry.

Q. What degree did you take?

A. I did not take a degree. [399]

Q. Now, as I understand it, you agree with Mr. Hook that fermentation alone will not produce spontaneous combustion, but that the bacteria die long before they get to the ignition point?

A. My statement was that Mr. Hook's conclu-

(Testimony of William D. Richardson.)

sion was the truth, but not the whole truth.

Q. How's that?

A. I said Mr. Hook's statement was true, but not the whole truth.

Q. Well, what takes place after the fermentation is oxidation?

A. Chemical oxidation takes place after the fermentation.

Q. That is the rapid taking on of oxygen by the pores of the material?

A. It may be rapid or slow.

Q. Well, the absence of oxygen would have something to do with that, would it not; if there was not oxygen to take on in quantity sufficient to force ignition, that would have something to do with whether or not combustion would take place?

A. Yes, it would.

Q. Ammonia is not a supporter of combustion?

A. Ammonia is not a supporter of combustion, no.

Q. What is the specific gravity of ammonia?

A. It is just slightly heavier than air; I can't give you the figure offhand.

Q. So that the ammonia coming off the bales of silk, in the hypothetical question put to you, in the refrigerator-cars, would stay down at the bottom?

A. Oh, just a moment; will you let me correct that—it is somewhat lighter than air.

Q. What is its specific gravity?

A. I can't tell you that offhand.

Q. How much ammonia was given off by the fer-

(Testimony of William D. Richardson.)

menting waste silk? A. I didn't measure it.

Q. Considerable quantities? A. Yes. [400]

Q. If they were confined in the cars, that would tend to reduce the chances of oxidation?

A. It would tend that way, yes.

Q. Well, as a matter of fact, it would largely reduce the chances of oxidation?

A. It would be difficult to say how far it would reduce the chances of oxidation, because we do not know just how much would be evolved, or how easily it would make an escape.

Q. Well, if it were giving off ammonia in considerable quantities it would eventually force most of the air out, wouldn't it?

A. It might or it might not.

Q. Well, would it not be likely to, if the ammonia is being generated it has got to get out somewhere?

A. That would depend entirely upon the relationship between the amount of ammonia being given off and the amount of air coming in.

Q. If ammonia is coming out from the inside, that tends to force the air out, does it not?

A. That again would depend on the amount of ammonia being given off.

Q. I say it would tend, if ammonia is being generated within the substance or within the car, it would tend to force the air out, would it not?

A. It may or it may not. It might start a draft that might force the air out at the top and draw air in at the bottom. It depends on conditions.

Q. I am assuming an insulated refrigerator-car;

(Testimony of William D. Richardson.)

a car that is insulated and a refrigerator-car that is as tight as possible.

A. It would depend on how tight the car was as to what the effect would be.

Q. When a material is heated to a high degree of temperature, with an oxidizable oil, and then it is exposed to the atmosphere, is not that the most likely time that it will produce rapid oxidation [401] and cause ignition?

A. Yes. It usually takes flame under those conditions, if it is heated hot enough.

Q. And if it will not take fire under those conditions, it is pretty unlikely that it will ignite, isn't that true?

A. No, that is not true at all. It is the oil I am speaking of, and I thought you were speaking of the oil.

Q. I am speaking of the material impregnated with the oxidizable oil, that would very much promote the chances of spontaneous combustion when it is exposed to the air.

A. It would promote the spontaneous combustion of the oil, being spread over a large surface.

Q. Now, let us see; you say that bacterial action produces low heat? A. A moderate heat, yes.

Q. And your idea is that on the top of that is superimposed an oxidation? A. Yes.

Q. Well, that increases the heat, doesn't it?

A. Yes.

Q. That keeps on increasing it? A. Yes.

Q. Do you know what the ignition point, for in-

(Testimony of William D. Richardson.)

stance, of the dried blood which you spoke of is?

A. No. I explained previously that it was very difficult to determine anything that we can call an ignition point of solid substances. My statement was that it was not difficult to determine the ignition point of a gas, but the ignition point of a finely divided solid was more than that of the gas, and the ignition point of a mass of fibrous material was still lower, but the exact temperature is uncertain, owing to the condensation of gases on the surface of the particles. I went into the theory of that. [402]

Q. You have never experienced any of this stuff loaded in a freight-car having ignited, have you?

A. Any fertilizer?

Q. Any of this dry blood that you spoke of and the tankage?

A. Yes, that occurs once in awhile, but not very often.

Q. Have you ever seen that personally?

A. I have seen the remains of the car.

Q. As I understand your testimony regarding the hypothetical question, the wetting of the cargo would tend only to aggravate the fermentation of the material?

A. As far as wetting is concerned, that would naturally tend to increase fermentation, because fermentation only occurs in the presence of moisture. My statement was, that so far as the wetting pro-

(Testimony of C. P. Beistle.)
duced a cooling effect, the cooling effect would retard the fermentation. I was distinguishing between wetness *per se* and cooling effect.

Testimony of C. P. Beistle, for Defendant.

And to further prove the issue on his part, the defendant called as a witness C. P. BEISTLE, and he gave testimony as follows:

Q. (Mr. KORTE.) State your full name.

A. C. P. Beistle.

Q. Where do you live?

A. Freehold, New Jersey.

Q. What is your occupation? And profession?

A. Chemist.

Q. And where did you receive your technical education; what school? A. Princeton.

Q. And how long have you been practicing your profession? A. Twenty-three years. [403]

Q. Principally for what concern?

A. Well, three years with the Pennsylvania State Experiment Station, and six years with the War Department, in the Bureau of Ordnance, and fourteen years with the Bureau of Explosives.

Q. What is the Bureau of Explosives, and what connection has that with the Interstate Commerce Commission, if any?

A. The Bureau of Explosives is an organization of railroads, steamship lines, express companies and a few manufacturers, to promote the safe transportation of explosives and other dangerous articles.

(Testimony of C. P. Beistle.)

The connection with the Interstate Commerce Commission is, that this organization is recognized by the Interstate Commerce Commission, and when the Interstate Commerce Commission issues rules for transportation of those articles, they consult with the Bureau of Explosives with regard to the drawing up of those rules.

Q. Has the Interstate Commerce Commission any independent bureau, such as the railroads maintain, or do they rely on this Bureau of Explosives with which you are working?

A. They have no independent organization to carry on this work, and they rely on us.

Q. On your recommendations? A. Yes.

Q. Then you have direct connection with material in cargoes which are being transported by rail?

A. Yes.

Q. It is your duty to examine into them and to determine which ones involve risk and which ones do not? A. That's right.

Q. You have been asked by me to experiment in relation to wet waste silk? A. Yes.

Q. And you made such experiments, did you not?

A. Yes, sir. [404]

Q. In your laboratory? A. Yes.

Q. Now, Mr. Beistle, what known materials are there of which you have actual knowledge, that do spontaneously burn or have and possess a hazard and risk which would make them a product which should be prohibited from shipment, or excuse a

(Testimony of C. P. Beistle.)

carrier from shipping or transporting them any great distance?

A. Well, such articles as garbage tankage and wet textile waste and fish scrap, and so-called wet alfalfa feeds and numerous others, cause fires and losses in transportation in carload lots, due to spontaneous heating.

Q. In relation to wet waste silk and its transportation, say, from Tacoma, Washington, to Providence, Rhode Island, which was the destination of the cargo involved here; there were some eight hundred bales which arrived at the Tacoma dock saturated with sea water; the bales, we will assume, weighed 133 pounds and were baled in the shape of a hay bale, covered with matting, not compressed tight, but baled tightly; they were completely saturated with sea water and laid submerged in sea water 14 days while at sea and then they were unloaded, and while being unloaded they were heating rapidly, to such an extent that the men had difficulty in getting them out of the hold of the ship unless water was turned on to cool them, or submerged; and after they came out they were placed in refrigerator-cars and they heated very rapidly; ammonia fumes and other fumes given off so that the men became sick in handling them; that cargo was tendered to the railroad for transportation in that condition.

From the experiments you made and the practical knowledge you have on the subject, will you tell the

(Testimony of C. P. Beistle.)

Court whether or not there was a risk of spontaneous combustion in connection with that cargo, which had to be transported from Tacoma to Providence.

Mr. SHORTS.—I object to that question, on the ground [405] that it calls for a conclusion which, under the theory of defendant's case, it is for the Court alone to draw.

The COURT.—He can answer it; but there is some other testimony of some kind in the record.

Mr. KORTE.—I never objected in the depositions to your witnesses testifying, on that ground, but I objected to your testifying to whether an ordinary freight claim agent should be a chemist, and that is what I objected to.

Q. You may answer that question.

A. I think there would be likelihood of it catching fire in transit.

Q. Give your reasons why you believe that wet waste silk, such as I described to you and such as you experimented with, is subject to spontaneous combustion.

A. Our experience shows that fibrous or porous or damaged materials which are subject to fermentation, and when packed in large mass wet, heat to a marked degree, and frequently go so far as to ignite in transit. Now, this material fulfils those conditions. It is packed and it is fibrous and porous; it has a large amount of fermentable material in it, and it would naturally be packed in carload

(Testimony of C. P. Beistle.)

lots, and it was wet, and it is known to heat and, therefore, there is no reason to believe that it would not have the same risk of catching fire as other materials which we know do repeatedly ignite under those conditions.

Now, we made experiments in our laboratory to show the amount of heating on this material and other materials that are organic fermentable materials, and, of course, we made them under exactly similar conditions. The way we carry on a test in our laboratory is: We had what is known as an incubator oven, which was kept at a constant temperature of 104° Fahrenheit, and inside this oven we had a small wooden box. No covering on the box. This box was 8x8x12 inches, inside [406] dimensions, and we mixed those various materials with water and packed them tightly in this box, and then we observed the rise of temperature which occurred, if any did occur, and we found that the silk had a considerable—had a degree of increase of temperature comparable with those other materials. I do not remember the exact figures of each one, but I can read it to you.

Q. Have you got the figures?

A. I have the memorandum in my pocket.

Q. Give the comparison between the known product which will spontaneously burn, and the silk waste under the same conditions.

A. Now, of course, it is understood that this is all at the starting temperature of 104° Fahrenheit.

Q. Yes.

(Testimony of C. P. Beistle.)

A. And the waste silk went to 122° Fahrenheit. One sample of waste hair went to 116.5° Fahrenheit. Another sample of waste hair went to 125.6° Fahrenheit. One sample of garbage tankage went to 120° Fahrenheit. Another sample of garbage tankage went to 127° Fahrenheit. A sample of rags, old dirty rags, not oiled, went to 122° Fahrenheit. Alfalfa feed, containing alfalfa meal, corn, oats and molasses, went to 131° Fahrenheit, and sample of alfalfa feed, containing alfalfa meal and molasses went to 118° Fahrenheit.

Now, all those materials that I experimented with were materials which were known to have been liable to spontaneous ignition. In fact, most of the samples I experimented with were taken from shipments, other portions of which had caught fire in transit, and, therefore, it was not a theoretical supposition that they might catch fire, but they were known to have done so.

Q. And from those comparisons which you made you draw the conclusion that there is no reason why wet waste silk would not [407] spontaneously burn?

A. No. I should judge from that that wet waste silk was liable to ignite in transit under those conditions.

Q. Now, I think you made an experiment, did you not, with the box which I have described; with the Mackey Oil Tester?

A. Yes, I made some experiments with that.

(Testimony of C. P. Beistle.)

Q. Is this a diagram of what is known as the Mackey Oil Tester (showing paper to witness)?

A. Yes, sir, that is a diagram of the apparatus, drawn to scale; that is a cross-section of it.

Mr. KORTE.—The defendant offers that in evidence as "Defendant's Exhibit No. 24."

(Said exhibit was received in evidence and marked "Defendant's Exhibit No. 24," and is transmitted to the Circuit Court of Appeals with all the other original exhibits.)

Q. Explain to the Court all about the Mackey Oil Tester, and why if it is a fact, that the experiments with that kind of apparatus do not prove anything in relation to spontaneous combustion?

A. Essentially, the Mackey Oil Tester consists of a water-jacketed vessel with a cover, and inside this vessel is a small basket or small cylinder made of wire gauze. This wire gauze cylinder is about six inches high and about an inch and a half in diameter, and that sits in the center of the air space, and the water-jacket is filled with water which is kept at the boiling temperature by heat underneath it.

Now the object of this tester, what it was built for and used for, is to test out the various oils, as to whether they are suitable in putting on various textile fibers, to facilitate the process of spinning and weaving. Some of those oils would have the proper physical properties in regard to lubricating them, but they would cause an undue hazard in the

(Testimony of C. P. Beistle.)

material catching fire spontaneously during the process. So they have evolved this thing to find out the oils which will have [408] the proper physical effects and at the same time have the least hazard in the process of handling fibers in the mills, of spontaneous combustion. This kind of test is not applicable at all for materials in which the spontaneous ignition, if any, starts with a sort of a fermentation or bacterial action, for the reason that the mass of material tested is very small. They only use seven grams of fiber, which would be about a quarter of an ounce, and you add fourteen grams of the oil to it. The whole thing together would be only about three-quarters of an ounce and, obviously, three-quarters of an ounce of most materials —there are very few materials indeed that three-quarters of an ounce of them would be liable to spontaneous combustion; certainly not like various fibers or tankage, or hair or anything like that.

Q. Then, in your opinion, it requires a mass in order to determine, as a matter of fact, whether this sort of materials which you know are liable to spontaneous combustion, as well as silk waste which yet is unknown, will spontaneously burn?

A. Our experience has shown that in no laboratory test of that material do we ever get a heat that is anywhere approaching ignition, nor do we ever get in a laboratory test a natural ignition of that class of materials, because the mass that can be experimented with in the laboratory is too small.

(Testimony of C. P. Beistle.)

I would say that even with a large mass of such as alfalfa feeds, where we are now carrying on experiments in co-operation with the feed interests of the United States Department of Agriculture, our preliminary experiments have been with bins four foot square and five foot high, of all of those feeds, which have been purposely made with an excessive amount of moisture and we did hope that maybe we can get up to the ignition point in them, but we did not get anywhere near it. I think the highest temperature we got was around 125° Fahrenheit. [409] Of course, we are only starting from the room temperature, around 65° or 70° Fahrenheit, so that our experiment as yet, even with a large bulk of material, say 80 cubic feet, has not resulted in spontaneous ignition in any case, and yet we know positively that those materials constantly are giving us trouble in carload lots in transit.

Q. Will you name those materials which you already know will spontaneously burn, if you haven't given them once?

A. Well, it is this class of material. I think I mentioned those alfalfa feeds, the garbage tankage and occasionally the packing-house tankage, and waste hair, and wool—I have known picked wool to do it, and cottonseed meal occasionally does it, and fish scrap does it. I am speaking of carload shipments. I don't know that hay will do it in such small quantities as carload lots. That is a point that has

(Testimony of C. P. Beistle.)

not been settled. I am rather in doubt—it will get a little bit hot in carload lots, but they did not give the heat—but, at the same time, I might say that ground hay, tried in this small testing apparatus, that is with the incubator oven, it gives practically no increase of temperature, not more than a degree, even when wet, and that shows that its heating propensities, are much lower than other materials I have mentioned.

Q. Would you think that a carload lot is of sufficient mass in the case of wet waste silk?

A. I should think that probably it was.

Q. Now, it has been said here that the fact that it has been soaked with salt water would tend to check fermentation; is that true?

A. No, that is not true, because the amount of salt would not be sufficient. Of course, if you had a very strong solution of salt you would check fermentation in almost anything. [410]

Q. Is not salt sometimes used to promote fermentation?

A. Well, there must be some mineral salts present in a solution of bacterial growth. I don't know that it is used particularly for to promote fermentation. It does not stop it though in the proportion that it exists in sea water.

Q. What relation has the fermentation period to spontaneous combustion?

A. Fermentation has two effects in causing spontaneous combustion. In the first place, it increases

(Testimony of C. P. Beistle.)

the temperature, and in the second place, it so modifies the composition of the material that it gets to a point where it is subject to a direct oxidation in a much more rapid rate than it was in its original condition, and this oxidation may be sufficient to carry it on to the point of ignition.

Q. So that from the testimony given by Mr. Hook, as you recall it, having heard it and read it, and also Mr. Little,—they experimented merely up to the fermentation period and not beyond?

A. Yes, sir; and as a matter of fact, with the experiments they carried on I doubt if hardly anything could have been ignited spontaneously.

Q. Why?

A. They did not use a large enough quantity. It was not one of the things which could occur, and, furthermore, when he added direct heat to his experiment, he immediately by that process killed his bacteria and sterilized the mass, and stopped that all right along. He did not parallel the conditions that exist in transit of large quantities.

Q. Neither did he have the quantity?

A. You have to have a large quantity to produce heat and hold it in there.

Q. In other words, you have to have the mass insulated? [411]

A. Yes, sir, the outside of the mass insulates the inside of the mass.

Q. Suppose this cargo was shipped in its wet condition, as I described it to you, in a sealed re-

(Testimony of C. P. Beistle.)

frigerator-car and boxcar across the continent, what effect would the closing of it in there and then watering it and sprinkling it at times and putting ice in the ice chest on the refrigerator, have on either deteriorating, retarding or increasing the hazard of spontaneous combustion?

A. The closing in of the car would cause the heat to increase more rapidly, because it would hold the heat inside; then when you add water to the material that would, of course, cool off the immediate portion of the material with which it came in contact, but by merely wetting it down and sprinkling it in a car, as it is possible to sprinkle it, you naturally would not add the water, that is keep the cold water all through the mass of the material.

Q. In other words, what kind of wetting would be necessary in order to eliminate hazard?

A. You would have to wash it until the whole mass was entirely cooled, and then by that time you would be back to the same starting condition, and when you shut up the car the bacterial action would immediately recommence and go on up until either one of two things happened; either until it reached its limit, and possibly catch fire, or until you opened the door and soaked the entire mass again. In soaking the entire mass, as I say, it would not be practicable if all the material was loaded in the car as this is said to have been.

Q. What effect would the icing have on it?

A. The icing would have hardly any effect, for

(Testimony of C. P. Beistle.)

the reason that it would only cool the ends of the bales next to the ice-bunker in the end of the car. [412] When material is being shipped in refrigerator-cars it is always packed or hung so that there is a circulation of air through the mass. If stuff is packed solid in a refrigerator-car, the cooling action on the bulk of the mass would not amount to much.

Q. They have suggested the putting of two-by-four slats between the bales. Would the effect of that be such that it would eliminate the heating inside the bales so as to destroy the hazard of spontaneous combustion?

A. It would not eliminate the heat inside the bale, and I do not think the circulation that you would get merely by that mode of action would give sufficient ventilation. The reason I have for saying that is, that we have had a great many fires in transit in ground charcoal, or charcoal screenings, and we require, among other precautions, that those bags must be packed with wooden strips between the bags, and it also shall be packed for ventilation vertically throughout the mass.

Now, while that, theoretically, ought to help things, our experience has been that we had a great many fires with that material until we attacked the proposition at its source. That is, we require that charcoal should be stored 21 days before it is ground; and after making that precaution we got very much fewer fires in the shipments of the ground

(Testimony of C. P. Beistle.)

charcoal; whereas, with the ventilation alone we had a great many fires. That makes me think that the ventilation of this merely by putting sticks between the bales, would not be effective.

Q. There has been something said here, too, in the testimony of Mr. Hook and Dr. Little, that the fact that the gases that were found by analysis in the waste silk, were noncombustible, and that had some bearing on the results; now, what about that?

A. Well, I do not think that that is an adequate reason, because [413] if it was you could have no kind of a fire, because the product of ordinary combustion is carbon dioxide, which is a noncombustible gas, and it is also heavier than the air, and if that is the case the heavy dioxide gas would settle down on the fuel and extinguish the fire, but the fact of the case is, that it does not happen that way.

Q. Now, when you speak of spontaneous combustion in relation to the waste silk, is it your opinion that there would be a flaming or a charring?

A. At first the material would, probably, char in the center of the mass and this charring would extend more or less towards the outside materials, and it might go so far as to finally ignite the matting on the outside of the bales which, of course, would be more readily ignited by heat than the silk itself, because it is made of straw, or something like that.

Q. And then, with reference to a wooden boxcar; what hazard would there be?

(Testimony of C. P. Beistle.)

A. A wooden boxcar would be ignited. We have commodities, of course, that, of themselves, practically will not burn at all, but they may get so hot that they will set fire to the car, and, of course, the inside of the car, of most freight-cars, is made of wood, and that could be set afire.

Q. Then the danger lies in coming in contact with something that is combustible?

A. Yes, or the material itself might get to the stage where it would be a glowing mass in the interior, and by the time it gets that far and generally gets farther down, and the bales break and cause the air to have more ready access to it, and at that stage of the game, why, the air increases the combustion.

Q. Dr. Little tried to demonstrate that the railroad companies haul manure heaps, and that spontaneous combustion did not result; give your experience with reference to that, and state [414] how they were hauled and what distances.

A. The shipment of manure is quite different from the shipment of this silk. In the first place, manure is always loaded in what we know as gondola cars, that is, open cars; in the second place, the value of manure is low, and, as a consequence, it is commonly shipped but a comparatively short distance. Of course, never by any possibility is it shipped across the continent. I could not say what the outside limits of the shipment of manure is, but, probably, the bulk of it is shipped inside of a hundred mile radius, where it gets to its des-

(Testimony of C. P. Beistle.)

tination within a day or two. Those two features—the comparatively short time it is in transit and the fact that it is in open cars—prevent the material from commonly doing more than just heating and steaming in transit.

Q. Then, the final conclusion, in your opinion, is that it would be taking a risk to have accepted this shipment and carried it across the continent between Seattle or Tacoma and Providence, Rhode Island, either by fast passenger or slow freight?

A. I think it would be a risk, yes, sir.

Q. What would you say would eliminate the risk, if at all; what would have to be done to the car in order to eliminate that risk?

A. The most obvious thing to do would be to dry it out.

Q. What kind of a process of drying would you suggest in order to preserve the fiber and not injure it?

A. Well, they have regular drying apparatus for textile fibers, which they use in those mills.

Q. Let us take it out here where there are no silk mills; how would you get at it as a practical proposition?

A. I should think that spreading it out on racks and putting some steam pipes underneath, and having lots of racks. [415]

Q. With artificial heating? A. Yes.

Q. Would artificial heating injure the fiber?

A. A moderate degree would not.

(Testimony of C. P. Beistle.)

Q. I am speaking now of drying it in the proper way. A. Yes.

Q. And not in a negligent way.

A. Of course, I am not a textile man, but I should certainly be justified in saying that drying this material out at a moderate temperature would not injure it.

Q. And I suppose they could have frozen it?

A. Yes, eventually it could have been frozen. It would have been difficult and it would be a slow process to freeze it, on account of the dimensions of the bale. Of course, eventually it could be done.

Q. If you loaded this mass of stinking stuff in a refrigerator-car, what effect would it have on this car?

A. The car would naturally have a bad odor. The odors from the smelling liquid and the ammonia would saturate the floor and the lining of the car and, probably, the insulation of the car, and it would require a great deal of difficulty to again condition that car for that shipment of food products. If that stuff got into the insulation of the car you might have to tear the car all to pieces. But at any rate, I should think it would be a very difficult matter to condition that car for food products again.

Cross-examination.

Q. (Mr. LYETH.) You studied chemistry at Princeton? A. Yes.

Q. What grade did you take?

A. Bachelor of Science. [416]

Q. How many years were you there?

(Testimony of C. P. Beistle.)

A. I was there three years.

Q. Well, as I understand your testimony, it is the mass that causes the danger of spontaneous combustion?

A. The mass is one of the factors necessary for spontaneous combustion in this type of material.

Q. Then the danger of the spontaneous combustion depends on the size of the mass? A. Yes.

Q. And how closely it is packed?

A. That is another feature.

Q. If those cars were only partially loaded with these bales of silk, would that have made any difference in your estimation?

A. If you only put a few bales in each car, the risk of spontaneous combustion would have been that much decreased.

Q. Are not refrigerator-cars constructed on what is known as the Bone-Siphon System?

A. I am not familiar with the details of the construction of the refrigerator-cars, by that system.

Q. They are designed to cool the whole car, are they not?

A. They are designed to cool the interior of the car, but if the material in the interior of the car is not so spaced as to give thorough circulation it does not get cool.

Q. If those bales were placed on scantlings that were put clear across the car, with spaces between each tier of bales so that they were practically suspended, there would have been circulation?

A. If you have space enough around to give circu-

(Testimony of C. P. Beistle.)

lation, why there would be circulation.

Q. Then the icing would have brought down the temperature?

A. The icing would have brought down the temperature of the interior—no, of the exterior bales. [417]

Q. And it would have decreased the danger of spontaneous combustion?

A. If you get sufficient air and circulation around those bales, it would in that much have decreased the danger of spontaneous combustion.

Redirect Examination.

Q. (Mr. KORTE.) Suppose these cars were sealed up, as they would be by government seal, and crossed the continent under the conditions I have described to you, by trying to wet them down, and the car did not actually burn up, what would be the probability of the heat accumulating to such an extent in the car that the moment you opened the door at the end of the journey there would be a flame?

A. Well, that might occur. In fact, it would be quite likely to occur in a refrigerator-car, for the reason that the refrigerator-car is tighter than the ordinary boxcar and you do not get as much ventilation or escape of heat, but the heat is confined in the refrigerator-car, and when you open the door, if you have the temperature up to the ignition point, it might burst into flame when the air gets in there.

Recross-examination.

Q. (Mr. SHORTS.) So that you think the real

(Testimony of C. P. Beistle.)

danger when shipping this across the continent in the refrigerator-car would be, not so much in the transportation across the continent as in the opening of the door to take it out after it got there?

A. No, not at all. That is just the thing which might happen. It might catch fire anywhere *en route.* You must not understand that a refrigerator-car is so tight that a fire cannot occur there. We occasionally do have fires occur in refrigerator-cars, but not on the refrigerator products, but some other causes and the car would be noticed in the yard with the [418] smoke coming out a little bit around the door or around the ventilator; so that fire can exist if enough air can get into the refrigerator-car to carry on combustion.

And to further prove the issue on his part, the defendant offered, and the Court admitted, in evidence, the following Rules and Regulations promulgated by the Interstate Commerce Commission:

Page 41, Rule 1801, Subdivision d:

"The following are forbidden articles for transportation: Rags or cotton waste oily with more than 5 per cent of vegetable or animal oil, or wet rags, or wet textile waste, or wet paper stock."

Page 42, Rule 1803:

> "This group includes all substances other than those classified as explosives that are liable under conditions incident to transportation to cause fires by self-ignition through friction, through absorption of moisture, or through spontaneous chemical changes."

Page 58, Rule 1838, Subdivision a:

> "Unless the preparation and nature of fibers or fabrics impregnated or saturated with animal or vegetable oils is such as to prevent all spontaneous heating in transit, such materials must be placed in hermetically sealed metal-lined wooden boxes or crates." And,

Subdivision c:

> "Rags, rag dust, waste wool, hair, and other textile wastes, must not be offered for shipment except when bagged, baled, or in other packages and when not wet. Waste paper or paper stock must not be offered for shipment when wet."

(The pamphlet containing said Rules and Regulations was received in evidence and marked "Defendant's Exhibit No. 25," and the same is transmitted to the Circuit Court of Appeals with all the other original exhibits in the case.) [419]

At the time Defendant's Exhibit No. 25 was offered in evidence some question arose as to whether or not the rules therein contained, and particularly Rule 1801, Subdivision D, on page 41, Rule 1803 on page 42, Rule 1838, Subdivision A, on page 58, and Rule 1838, Subdivision C, the same being the rules hereinabove set forth, were in force and effect at the time the shipment in question was tendered. Thereupon counsel for defendant stated that while said rules had been previously promulgated, they were not in force and effect at the time the shipment in question was tendered and did not become effective until September 1, 1918.

And in connection with the foregoing Rules and Regulations, being the Defendant's Exhibit No. 25, the defendant offered, and the Court admitted in evidence as Defendant's Exhibit 25–A, the Rules and Regulations relating to the transportation of dangerous articles by freight or express, in force under the orders of the Interstate Commerce Commission, of date October 1st, 1914, being Rules 1801, 1803 and 1838.

(The pamphlet containing said Rules and Regulations was received in evidence and marked "Defendant's Exhibit No. 25–A," and the same is transmitted to the Circuit Court of Appeals with all the other original exhibits in the case.) [420]

Testimony of H. K. Benson, for Defendant.

And to further prove the issue on his part, the defendant called as a witness H. K. BENSON, and he gave testimony as follows:

Q. (Mr. KORTE.) Will you please state your full name? A. H. K. Benson.

Q. Dr. Benson, what position do you hold out here at the University of Washington?

A. Professor of Chemical Engineering and Head of the Department of Chemistry.

Q. And where were you educated and where did you receive your technical knowledge of chemistry?

A. I undertook my undergraduate work at Franklin-Marshall College. I received the degrees of A. B. and A. M. My graduate work was undertaken at Johns-Hopkins University and Columbia Uni-

(Testimony of H. K. Benson.)

versity. At the latter place I took the degree of Doctor of Philosophy.

Q. How long have you been connected with the University of Washington in the chair of chemistry? A. Since 1904.

Q. And during that time you have made a study of spontaneous combustion, have you?

A. I have.

Q. And its relation to certain of the materials that we know will inflame? A. I have.

Q. Will you explain, in a general way, what spontaneous combustion is and how it arises and is caused in various materials?

A. I made a study of this subject some 12 or 13 years ago and incorporated my findings in a text book on engineering and industrial chemistry for engineering students, published in 1913 by the Macmillan Company. I would be glad to develop the idea underlying spontaneous combustion, if I will be allowed to use the illustrations which are necessary for such a discussion. [421]

Q. You may do so.

A. The simplest case of spontaneous combustion is that of yellow phosphorous. If I take a piece of yellow phosphorous and put it on the table in front of me it will spontaneously combine with the oxygen of the air in this room, with the liberation of heat. At first there is no flame. If the room be darkened and we continue to look at it we notice that presently it begins to glow; it changes its color and it becomes a red body. If we still watch the experi-

(Testimony of H. K. Benson.)

ment we will find that it will presently burst into flame; and we may say that the phosphorous has spontaneously inflamed, or that spontaneous combustion of phosphorous hase taken place. This last stage has only been reached when the amount of heat generated exothermically when the reaction between the phosphorous and the oxygen has exceeded that which is conducted away by radiation, convection or conduction. The matter of spontaneous combustion, therefore, is a matter of relative degree, as to whether a flame is present or not.

The same thing is true with reference to a grease spot. If we drop a particle of grease on a hot plate, ordinarily we see nothing happens except it evaporates, but if we examine it in the dark we find that during the evaporation oxidation has taken place and the glow is present even though there is no flame.

The second case of spontaneous combustion that is familiar to technical men in general, is that of carbon. If we take charcoal out of the charcoal oven, as we have done in our experimental work in the University, and allow freshly made charcoal—take a sample and remove a piece of it to the laboratory and lay it there, nothing happens; but if we leave it in the cars or take it out of the cars in mass, or leave it in the cars in mass, sometimes it will spontaneously inflame and destroy the entire amount of charcoal. [422]

This particular reaction has been studied in detail and recently an announcement of the results

(Testimony of H. K. Benson.)

has been made by Professor Hulett of Princeton, in which it has been found that the explanation arises, or lies in the fact that the oxygen of the air does combine with carbon to form, not a gas, but a solid oxide of carbon to which he ascribes the formula O_5 O_4, I think. The formation of a solid oxide of carbon is attended with the liberation of a tremendous amount of heat.

We know, for example, if we wish to melt a cake of ice, that we must apply some heat to it. If we take the water from the melted ice and change it into a gas, we know that he must supply some more heat. The reverse is equally true. If we take a gas and make a solid substance out of it, we know that heat must be taken away from it in some form or other. In other words, it is liberated. So that we have the explanation that lies in the inflaming of charcoal, which is a matter of very common knowledge among all charcoal producers.

If we take cellulose, a more complex material than carbon, we find the same thing takes place, provided that the surface of the cellulose is of such a character as to make it porous. Shingles, overdried in kilns, do spontaneously inflame, in spite of the fact that the temperature of the dry kiln never exceeds 220. This fact is well known by lumbermen generally, as stated in the literature.

Q. Have you had practical experience along that line in reference to that particular subject?

A. In an investigation of that subject, yes.

The explanation that is made for this occurrence

(Testimony of H. K. Benson.)

is based upon this fact, that cedar shingles, for example, are highly porous. After the moisture is removed from the intercellular cavities or spaces, something must take the place which the vapor hitherto had occupied. That something is air. [423]

Gases have a tendency to become concentrated on the surface. The greater the surface, the greater the concentration of the gases. The concentration of gas, however, means compression of gas, means the liberation of heat.

So great is the amount of heat in the gas of palladium, for example, that if we had a cubic centimeter of palladium it will absorb 500 cubic centimeters of oxygen. In other words, the gas volume is reduced 500 times—from 500 to 1—and that means an enormous compression and liberation of heat.

So that the general summary of the manner in which is developed, necessarily, for a given substance to spontaneously inflame, must be stated in this way: That it is necessary to bring about some initial rise of temperature. That initial rise of temperature may be mechanical compression due to absorption. It may be the heat that is liberated by bacteriological process such as fermentation. It may be plain chemical oxidation, or it may be atmospheric temperature, such as is encountered in vessels which sail through the tropics.

Several years ago the steamship "Oregon," I think it was, sailing around the Cape, developed several spontaneous combustion fires in its bunkers after

(Testimony of H. K. Benson.)

they came on the west coast of South America.

Any one of those causes, then, may be responsible for initiating the spontaneous combustion; if at any time thereafter the quantity of heat generated is greater than that which is conducted away, spontaneous combustion will ensue, provided the material is combustible.

Q. Take raw waste silk; you are familiar with it, are you? A. I am.

Q. And you have experimented with it?

A. I have. [424]

Q. What would you say as to whether that contained elements which would be necessary to initiate heat sufficient to produce spontaneous combustion?

A. Raw silk or silk waste is susceptible to fermentation. During this fermentation a certain amount of heat is developed; and certain products are subject to destructive distillation at lower temperatures, secondary products are formed which were not present at first in the silk itself. Those secondary products are of a more volatile character, or else they are of a more porous character. They are, in general, of a more unstable character. They may either be of such a structure as to enable the absorption of gases rapidly and result in their compression, and through heat liberation can actually be oxidized much more readily than the original material itself. We know this to be a fact with other materials which are distilled at low temperatures.

Q. What particular material which is analogous

(Testimony of H. K. Benson.)

to raw silk do you have in mind which will spontaneously burn?

A. Any porous organic matter will be liable to a fermentation. The spontaneous combustion of hay and bran have been studied by Ranke and Hoffman. Hoffman has studied bran particularly, in which bags of bran were put in the thermostat and kept at various temperatures for a certain number of hours and then pulled out, and in some cases they inflamed even belolw 100° Centigrade. In most cases it took 175° centigrade, and in some cases they did not inflame at all, although kept under the same conditions.

Q. And therein lies the uncertain period of the initial point?

A. That, and perhaps they were differently packed in some cases. The absorption of heat, for some reason, did not take place in some cases as in others.

Then the matter of hay fermentation and its spontaneous combustion [425] has been very thoroughly studied. The Agricultural College Experiment Station of Iowa has published a bulletin on this subject, "Ford's Dairy Farm," and has been warning their readers against spontaneous combustion of grains and produce which are stored in feed bins. The Committee on Standards of the National Board of Fire Underwriters have issued warnings and issued instructions to farmers for the construction of bins for the purpose of avoiding spontaneous combustion.

(Testimony of H. K. Benson.)

This investigation in Germany has been conducted by Maynard—I have forgotten the date—in which he has worked out rather definitely the conditions under which hay will spontaneously burn. He shows that masses, I think, of 45,000 pounds are necessary for this type of combustion to take place.

My own experience on the farm showed to me that we were always afraid of it in that section of the country in Eastern Pennsylvania, where practically all hay was stored in barns, not stacked but put in the barns. Every year there were fires that took place shortly after haying, which were usually attributed to the heating of the hay.

I know of one instance in Kansas where a boy was sent into the hay mow and he ran a stick through it. The stick dropped down and it opened up and the whole business flared up at once.

Q. Now, in relation to wet waste silk in the cargo which was tendered to the railroad at Tacoma, which had been soaking in water for 14 days in the hold of the ship, and when it came out the bales were so hot that they required to keep them saturated or submerged practically in order to handle them, and after the bales were out of the hold of the ship they still heated, and were still heating when they were put into the two refrigerator-cars, and they heated and smoked so that they became alarmed lest spontaneous combustion might occur. Now, first, would you [426] say from the experience which you had and the investigation which you made, that there would be a risk and hazard of

(Testimony of H. K. Benson.)

spontaneous combustion in transporting those bales, each of them about 133 pounds, and baled a good deal like hay would be baled, wrapped with matting on the outside, to ship that cargo across the continent from Tacoma to Providence, Rhode Island?

Mr. SHORTS.—I object to the question because there is no evidence of smoking.

Mr. KORTE.—I mean fuming—I would not say it was smoking, but steaming—they appeared like they were smoking—fuming and ammonia.

A. I will say that there was a risk.

Q. There was a risk in shipping them?

A. Under those conditions, they might or they might not cause spontaneous combustion, depending on the conditions.

Q. Would there be a risk?

A. There would be a risk.

Q. And suppose that they were loaded into refrigerator-cars with slats between the bales and then they were watered while en route as often as we had facilities between terminals, and say that there was ice kept on them, would that change your opinion and eliminate the risk in carrying that shipment across the continent?

A. Taking up the first of those. If there were slats in there I would say it would increase the conditions for spontaneous combustion very much, because a plentiful supply of stagnant air is one of the prime requisites, because the air itself becomes heated up during this fermentation and thereby the reaction between the oxygen and the products of

(Testimony of H. K. Benson.)

fermentation causing those products to oxidize, would be very much more rapid than if the air was not there. Wetting it, if the bales were kept immersed in water, I think, would be absolutely safe to [427] ship it. In other words, if it were possible to cool down every particle or every fiber of the silk waste to the temperature of water, and to do it frequently enough.

Mr. SHORTS.—There is no question about that.

Q. (Mr. KORTE.) Well, assume that wetting going on would be on the outside of the bales, as best could be done by applying it with a small garden hose.

A. I don't know how effective the cooling could go on. It is a matter of cooling rather than of water. Moisture is one of the conditions of fermentation, but cooling is unfavorable to fermentation. The same way with the icing. Silk is a fairly good insulator; consequently, there would be no guarantee that ice in the ends of the car, with fermentation in progress at the time, that is, that a sufficient quantity of ice could be applied that would effectively cool it through the entire mass.

Q. You would still have the risk of spontaneous combustion? A. Yes.

Q. Now Dr. Little and Mr. Hook, who have given their depositions and you have read them and you know just what they did,—they have made what are known as laboratory tests and merely got a fermentation heating, and from that they concluded that wet silk waste will not spontaneously burn. Can

(Testimony of H. K. Benson.)

you tell the Court why their conclusion is wrong?

A. I never knew of a laboratory test that had been devised to indicate spontaneous combustion. The reason for that lies in the fact that it is a delicate balance between heat loss and heat generated—spontaneous heat generation and the heat losses through conduction, convection and ordinary radiation. So that I have never been able to duplicate the results that we got in practice when the quantities are in mass. Our charcoals spontaneously inflame when it is in [428] a pile. The charcoal manufacturer will tell you the same thing, but when he tries to make it spontaneously inflame in the laboratory, there is no method that yet has been devised that will enable him to do it at the same temperature. In working with small masses like that, on account of the delicacy of the heat balance at that particular point, I cannot see how it can be done without very delicate and intricate and well controlled apparatus.

Q. To justify your conclusion, did you take certain material which we know does spontaneously burn in large masses and attempt to test it out with the laboratory test, and what result did you find?

A. I took waste silk and old rags and hair—upholster hair and alfalfa feed, containing alfalfa meal and molasses,—and I put those materials in Duer flasks, moistened them with water and inserted a thermometer and measured the temperature and put them in an incubator maintained at 37° Centi-

(Testimony of H. K. Benson.)

grade, that is blood heat, and all of the material acted just about the same, so far as the temperature rise was concerned. It started in at 37° Centigrade in each case, of course, and it ended up at about 41° Centigrade, with the highest being 43°. I can give you the exact figures for each of those.

Q. I wish you would, to show what they are.

A. The highest temperature was the waste silk at 43° Centigrade.

Q. Have you those in Fahrenheit as well as Centigrade?

A. I have not. But you can multiply it by 1.8 and add 32.

Q. Have you the figures?

A. The waste silk was 43°; the alfalfa meal and molasses was 38°; the textile hair was 43°; the old rags was 43°; and another hair, upholster hair, called curled hair, was 43°.

Q. Now, Doctor, taking into consideration the consideration of this cargo of wet silk in a saturated condition as it came out of the [429] hold of the ship, and if you were required to recondition it, what would you want done the first thing in order to recondition it so as to ship it?

A. Well, I think there are three methods. The natural one would be to dry it, I think, in a dry kiln—kilns that are prepared; and open up the bales as much as possible and put them in and keep them apart with good circulation of air, and washing it carefully.

Q. Are there dry kilns around this territory?

(Testimony of H. K. Benson.)

A. Yes. The other method, I think, would be to freeze it absolutely solid; and the third method, I think, would be to send it in a tank immersed.

Q. Of course you would have to boil out the gum and dry it? A. Yes.

Q. There are drying houses around here?

Mr. SHORTS.—You did not show that we had access to any drying houses.

Mr. KORTE.—All you need to do is to get a tub with water.

Q. All you need is, you could put it in an ordinary wash tub and wash it? A. Yes.

Q. In other words, you could degum it?

A. Degum it.

Q. And to degum it merely requires what?

A. Boiling it with hot water or with alcohol.

Q. And then dry it? A. Dry it.

Q. And there would be no damage at all?

A. No.

Q. Now, would artificial drying injure the fiber, if carefully done as it should be done?

A. I am not familiar with that; I have not had enough experience with textiles to say whether it would or not. I can only [430] express an opinion.

Q. Give us the benefit of your opinion.

A. That is, if it were dried indoors?

Q. Yes.

A. There would be very little.

Q. In a dry kiln?

A. In a dry kiln dried slowly without too violent

(Testimony of H. K. Benson.)

contractions and expansions or changes of volume, where it would have a tendency to explode the fibers. If it were done slowly with a good temperature with good air conditions, I think there would be no effect. However, drying it in the sunlight might have some effect on it.

Q. If it were dried in the sunlight?

A. If it were dried in the sunlight, because the sunlight induces oxidation to some extent.

Q. Leaving it out in weather like we have here in August, September, and October, mostly raining, would it benefit it?

A. I don't think it would.

Q. Considerable has been said here about sea water being a deterrent of fermentation and the destruction of bacteria; is that true?

A. I tried that out. I used waste silk in sterile water in Erlenmeyer glass flasks, taking a quantity of silk and 300 cubic centimeters of sterile water, and I also used 3% of ordinary salt solution. I also used sea water and then put it in the incubator; starting it with cotton, and the results were identical in all three of them, so far as I could tell; it developed the same putrid odor in about the same time, and about the same growth of organisms apparently in all cases.

Q. Do you know whether or not, while the raw silk was fermenting, any objectionable smell or fumes were given forth? [431]

A. Yes. There was a pronounced odor of ammonia that developed at the end of a few days,

(Testimony of H. K. Benson.)

which could be tested for readily, and I did test for it, and I smelt it, too; but the most pronounced thing is the putrid smell, privy-like smell, that develops in connection with the silk.

Q. So that, in order to handle it, you would have to have men whose olfactory nerves are very obtuse, or scavengers who are used to handling that kind of material, in order to properly carry this material across the continent?

A. That smell is one of those products of decomposition; it is caused by decomposition.

Q. It is very objectionable to be around it.

A. There is the gas. There are probably just as many others which are not gases, which are developed as the result of fermentation—some solids and some liquids.

Cross-examination.

Q. (Mr. LYETH.) Dr. Benson, it is oxidation causes spontaneous combustion, practically speaking? A. At the end point.

Q. Fermentation alone won't do that?

A. Fermentation alone won't do it.

Q. Bacteria does? A. Bacteria does.

Q. The amount of the mass, as I understand your testimony, is what determines the degree of danger of spontaneous combustion?

A. Yes, to this extent: That the mass must be large enough to insure the safety factor of insulation from the conduction of the heat away from the mass where the oxidation is taking place. You cannot do that where you have a small mass.

(Testimony of H. K. Benson.)

Q. Well, by a mass, you mean stuff packed close together? A. Quantity, yes.

Q. Packed together?

A. Packed together. [432]

Q. Combustion takes place, if at all, in the center of the mass and not on the outside? A. Yes, sir.

Q. Is ammonia a supporter of combustion?

A. No, it is not.

Q. Ammonia is given off in large quantities?

A. Ammonia is given off in large quantities as one of the products.

Q. By fermentation? A. By fermentation.

Q. And that would tend to choke combustion?

A. Well, one would think so, but I had an experience two months ago where sawdust was soaked with ammonial salts, and we made tests in the laboratory for the purpose of convincing ourselves that nothing could happen during the drying. We tried to burn it by spreading it out and making a little pile, and it would not burn, even with the Bunsen burner. We put it on the steam radiators in a large dishful, and nothing happened. So we put it in the oven and heated it up to 130° Fahrenheit, and nothing happened. But we took 500 pounds of it and put it in the dry kiln and examined it from time to time. We tried it with 2% moisture and nothing happened; but that night at midnight it shot up in the air with a flame 200 feet high, in spite of the fact that the temperature of the kiln never exceeded 130° Fahrenheit and the temperature was never more than that. There was

(Testimony of H. K. Benson.)

a man watching it at the time.

Q. That was a case of burnig?

A. No, it is not a case of burning. There was no case of burning; it was sawdust saturated with ammonia nitrate, and ammonia nitrate does not volatilize at that temperature, and if it had been ammonia nitrate that was given off it might have retarded it. Then again, ammonia itself will burn. That is the basis of our experiment with— [433]

Q. (Interposing.) Ammonia gas will not support combustion?

A. No. It will burn itself, however, under proper conditions, if it is in the presence of platinum as a catalytic agent, but carbon is also a very good agent, and carbonized cellulose is, probably, just as good an agent.

Q. But you do not think that with the few bales of silk there would be any danger?

A. I don't think there would.

Q. It would depend on how many bales in the car there were and how close they were packed?

A. Yes.

Q. (Mr. KORTE.) In this instance, there would be about 230 or 200 bales in the car; that would be a sufficient mass, wouldn't it?

A. I cannot prophesy.

Mr. LYETH.—I do not know where the evidence is of that fact.

Mr. KORTE.—You had four carloads.

Mr. LYETH.—We were going to ship in the refrigerator-car.

(Testimony of H. K. Benson.)

And to further prove the issue on his part, the defendant offered in evidence a pamphlet containing the Interstate Commerce Commission's Rules and Regulations, dated October 1, 1914, being the rules applying to this particular case, and Special Rule 1801, Rule 1803 and Rule 1838, and the same were admitted in evidence and marked "Defendant's Exhibit 25–A," and are transmitted to the Circuit Court of Appeals with all the other original exhibits in the case. [434]

Testimony of H. B. Brownell, for Defendant.

And to further prove the issue on his part, the defendant called as a witness H. B. BROWNELL, and he gave testimony as follows:

Q. (Mr. KORTE.) State your full name.

A. H. B. Brownell.

Q. You are in the employ of the Chicago & Milwaukee Railroad Company at the present time?

A. I am.

Q. And you were in the employ of the Railroad Administration operating the Chicago & Milwaukee in August, 1918, were you—you were working for the railroad company in 1918? A. I think not.

Q. Who were you working for?

A. I don't think I was working for anybody.

Q. When did you go to work for the railroad company?

A. I think it was in September of 1918.

Q. Anyway, you are now working for them, and in what capacity?

(Testimony of H. B. Brownell.)

A. Chief Rate Clerk in the General Freight Department.

Q. And that office, and you, as such rate clerk, have charge of the tariff and rates and the conditions upon which transportation of freight and passengers will move over its railroad?

A. Yes, sir.

Q. And have you in your possession the tariff which governed the shipment of raw silk from the Orient, known as Transcontinental Freight or Transcontinental Tariff?

A. I have in my possession what is known as Transcontinental's Freight Bureau, Eastbound, Tariff No. 30–B, I. C. C. 1051.

Q. Is that the tariff that applied to the transportation of raw silk in bales in its normal condition?

A. The tariff named charges covering the transcontinental movements of imported silk in bales. [435]

Q. Now, will you turn to the page of that particular tariff which was in effect in August, 1918?

A. Yes, sir, here it is.

Q. Will you turn to the page and read into the record that portion of the tariff which relates to the rate and the facilities for the movements of such commodity?

A. Item No. 75 of that tariff applies to silk, raw, spun and silk goods in packages, and names a rate of $7.50 per 100 pounds, under column marked L. C. L., which would make the rate to apply on

(Testimony of H. B. Brownell.)

silk in any quantity of shipments.

Q. What does "L. C. L." mean?

A. That is an abbreviation for "Less Carload," and is subject to Rule 20 of the tariff.

Q. You said the rate in there was $7.50 per 100 pounds? A. Yes, sir.

Q. Was there any other rate than the $7.50 per 100 pounds at that time?

A. No, sir; not imported silk.

Q. Had there been a previous rate, which this particular tariff superseded? A. Yes.

Q. This was the tariff which was issued by the Director General? A. Yes.

Q. Now, turn to Rule 20, which you say that such shipments of raw silk at $7.50 were subject to.

A. Rule No. 20 reads: "Shipments of silk and silk goods are usually handled in passenger trains, protection of carriers, and other articles for which specific commodity rates are provided herein may, unless otherwise specifically provided in individual rate items, be given train service as shipments of silk, raw or spun, or silk goods; the rate for said articles when said service is given is $7.50 per 100 pounds, subject to minimum charge of [436] $7.50."

Q. Then that $7.50 per hundred pounds applied whether it was freight or passenger service?

A. Yes.

Q. And whether it was slow or fast? A. Yes.

Q. And in connection with the movement as outlined there in Rule No. 20, with whom lay the op-

(Testimony of H. B. Brownell.)

tion, if at all, as to how that shipment should move,—with the carrier or the shipper?

Mr. SHORTS.—I object to that as calling for a conclusion of law.

Mr. KORTE.—I merely want to get the benefit of his interpretation of that.

The COURT.—He may answer the question for what it may be worth.

Q. With whom lay the option?

A. With the carrier. There is no specific provision that the silk must be handled in passenger trains.

Q. Had the tariff previous to this made a specific requirement that it might be handled in passenger service when requested by the shipper?

A. The import tariff in effect previously had carried such a provision.

Q. That was before it was changed by the Railroad Administration?

A. It was not changed by this. It was cancelled outright by the Administration, and this tariff was some time afterwards.

Q. Have you got the late tariff with relation to the fast train service? A. I have not got it here.

Q. You can get it? A. I can.

Q. Now, further, in connection with such a movement, say of raw silk, whether in a dry or wet condition, is there any provision in [437] the tariff relating to watering such a commodity?

A. No, sir.

Q. What watering privileges are recorded in the

(Testimony of H. B. Brownell.)

tariff, and have you the tariff with you which relates to watering?

A. We publish no provision for the watering of any commodity in transit.

Q. Is there any icing privilege accorded a commodity such as raw waste silk, by the tariff?

A. No, there is no icing privilege specifically accorded to waste silk.

Q. Have you got the icing privilege tariff with you? A. I have.

Q. Will you produce it?

A. I have a copy of it.

Q. That was in force at that time? A. Yes.

Q. On what page does it appear on this tariff with reference to the icing?

A. The entire tariff is in reference to icing, refrigeration and heating-car service.

Mr. KORTE.—I will identify these two, before I go to far into it.

Identification No. 26 is the Transcontinental Freight Bureau Tariff, Eastbound and Westbound Tariff No. 25–C, in effect December 19th, 1914, and supplements thereto—that is, it is effective from then on until discarded; that is the eastbound and westbound refrigeration, local and joint rates for refrigeration on carload shipments.

Identification No. 27 is the Transcontinental Freight Bureau Tariff, Import, commodity rates relating to the shipment of raw silk.

Q. Does Defendant's Exhibit No. 27 for Identification, being the Transcontinental Freight rates on

(Testimony of H. B. Brownell.)

commodities, include all the tariffs on the subject of the transportation of raw silk in any form?

A. No, sir, it does not. [438]

Q. Well, what is there in addition?

A. It includes, or names the only tariff; it is the only tariff naming transcontinental eastbound import rates on raw silk, however.

Q. Is not that the rate which would apply to shipments coming from the Orient? A. Yes.

Q. Now, is that all of the tariff there is on such an importation?

A. Yes, providing it has gone through in the original package. A shipment that would break bulk in Seattle and be forwarded in other than the original packages, would be subject to domestic rates.

Q. I didn't ask you about that now, but what I want to know is whether that tariff, Exhibit No. 27 for identification, is the only tariff that relates to the shipments of raw silk in bales from the Orient?

A. The only tariff applying on such shipments; yes, sir.

(No cross-examination.)

And to further prove the issue on his part, the defendant offered in evidence the Tariffs filed with the Interstate Commerce Commission relating to refrigeration in carload shipments, and the Transcontinental Import Tariff on import commodity rates, relating to the shipment of raw silk and other articles, and the same were admitted in evidence, marked "Defendant's Exhibits Nos. 26 and 27,"

and the same are transmitted to the Circuit Court of Appeals with all the original exhibits in the case.

And to further prove the issue on his part, the defendant offered in evidence a policy of insurance, insuring the goods involved [439] in this suit, and the same were received in evidence and marked "Defendant's Exhibit No. 28," and the same is transmitted to the Circuit Court of Appeals with all the other original exhibits in the case.

And to further prove the issue on his part, the defendant offered in evidence three receipts given for money which was paid by the insurers to the plaintiff in this case, and the same were received as one exhibit and marked "Defendant's Exhibit No. 29," and the same is transmitted to the Circuit Court of Appeals with the other original exhibits in the case.

Testimony of H. Schroeder, for Defendant.

And to further prove the issue on his part, the defendant called as a witness H. SCHROEDER, and he gave testimony as follows:

Q. (Mr. KORTE.) State your full name.

A. H. Schroeder.

Q. What is your business?

A. Assistant Freight Claim Agent of the C. M. & St. P. Railroad.

Q. You held the same position, did you, with the Railroad Administration while it was operating the St. Paul road in 1918? A. I did.

Q. And at that time did you know Mr. Meyer of the Pacific Oil Mills? A. Yes, sir.

(Testimony of H. Schroeder.)

Q. Mr. Meyer testified yesterday that at that time he delivered to you samples, a bundle of the wet silk involved in this suit after it was dried and shipped; he said that the part that I am now showing you, being Defendant's Exhibit No. 22, was part of it. Will you tell the Court whether or not that is the portion which you received from him? [440]

A. That is a portion of the waste silk that I received from Mr. Meyer, and he informed me that that was a part of the cargo.

Q. Now you say that was a portion of it?

A. Yes.

Q. How much, approximately, did you receive from him?

A. Several pounds more; about one-third more than that.

Q. And what did you do with the portion which was not shown there or produced here in Exhibit No. 22?

A. I shipped that to Philip Cheney, Providence, Rhode Island.

Q. You mean Cheney Brothers?

A. Or to South Manchester, Connecticut, rather.

Q. In what condition did you ship it; how did you prepare the bundle with relation to sealing it before it was sent, and by what method was it sent?

A. It was sealed in the manner that valuable packages are ordinarily sealed when forwarded by express, and then turned over to the American Railway Express Company for shipment.

Q. You said you sent it then under seals?

(Testimony of H. Schroeder.)

A. Yes, sir.

Q. By the American Railway Express Company?

A. Yes.

Q. And state whether or not the receipt that I now hand you was the one which was issued to you by the American Railway Express Company.

A. It was; yes, sir.

Q. Showing the date when it was sent?

A. Yes, sir.

Q. You delivered that personally, did you, in the sealed condition? A. I did; yes, sir.

Cross-examination.

Q. (Mr. SHORTS.) Does the receipt show the date of the shipment? A. Yes, sir. [441]

Deposition of Philip Cheney, for Defendant.

And to further prove the issue on defendant's part, the deposition of PHILIP CHENEY was introduced and read in evidence, as follows:

Q. (Mr. KORTE.) Give your full name.

A. Philip Cheney.

Q. Where do you reside?

A. South Manchester.

Q. And what is your business or occupation?

A. Silk manufacturer.

Q. Connected with what company?

A. With Cheney Brothers.

Q. Of South Manchester?

A. Of South Manchester.

Q. How large an institution is the Cheney Brothers Silk Mills Manufacturing Company?

(Deposition of Philip Cheney.)

A. We employ practically five thousand hands.

Q. And the capacity of the mill or plant?

A. Well, I couldn't give you that. The spun silk end of it is the small part of it.

Q. What is the entire business of manufacture from beginning to end?

A. We start with the waste and raw silk and manufacture it into finished goods.

Q. When was this Cheney Brothers plant first established; how long has it been in existence?

A. It started in 1832 and incorporated in 1838.

Q. And has been operating ever since?

A. It has been operating ever since.

Q. By the Cheney family? A. Yes.

Q. What special study have you had, Mr. Cheney, in relation to the original treatment of silk wastes and silk for the process [442] of manufacture?

A. I started in in the dressing department and worked my way through the department, machine by machine; that is, I worked on a machine until I could make as good piece-work wages on that machine as the other men in the room, then I would move on to the next machine. In the machine repair-shop it took me approximately five years to go through that one department.

Q. Then after that?

A. After that I was assistant superintendent until my cousin died, then I became manager of the department.

Q. You are a member of the Cheney family?

A. Yes.

(Deposition of Philip Cheney.)

Q. Have you made any special study with reference to maceration or degumming of the waste silk and bacterial action in connection with it?

A. Yes, I took a course at the College of Physicians and Surgeons in New York in the early part of 1902, in bacteriology, with the idea of working out a scientific method of maceration.

Q. What do you mean by maceration of waste silk or silks?

A. Decomposition of the silk gum by bacterial action.

Q. You speak of decomposition of the gum. Describe the silk as it is thrown out by the silkworm with reference to the gum and the fibre, what it is that makes the silk eventually.

A. The silkworm spins his cocoon by throwing out a single fibre, which is surrounded with a silk gum, and the worm spins around himself his chrysalis, the outside fibres of which are attached to the mulberry tree. The cocoon is spun out by the worm in a continuous fibre which is more or less stuck together by the action of the soft gum, different layers of fibre sticking to each other, and as the gum hardens they are more or less stuck together. You couldn't unwind the fibre without softening the gum. [443]

Q. Then the product for manufacture is the silk fibre encased in this gummy substance?

A. Yes, the reeled silk is made by unwinding the silk fibre and reeling it in a skein. What waste is

(Deposition of Philip Cheney.)

made in that process is bought by silk spinners and spun by machinery.

Q. Describe a little more fully what goes to make up what is known in the case as silk waste.

A. There are several kinds of silk waste. One kind is the pierced cocoons, so-called because the moth has been allowed to eat its way out in order to lay eggs for the next season's crop. That is a waste product, because the moth pierces the end of the cocoon and breaks the fibres, and it cannot be unwound. The other quality of waste, usually known as "frisons," is the outside layers of the cocoon and the very inside layers; that is, the first and the last layers of silk that the worm spins. The outside are too coarse for reeled silk and the inside fibres are too fine, so they are a waste product and are sold as waste silk.

Q. Now take what is known as Canton steam waste, Nos. 1 and 2; is that made up of the various parts of the silkworm's product?

A. Yes, that is made up in the province of Canton in the filatures. It consists of the outside layers of the cocoon and the very inside and what other waste is made during the reeling process.

Q. Name any other waste that you have in mind that go to make up the steam waste.

A. Why, it is any waste that is made in reeling the cocoons in the filatures. If a cocoon is found to be damaged by being eaten by a worm or by any other damage, it is thrown out and goes into the waste silk.

(Deposition of Philip Cheney.)

Q. What do you mean by the term "filature" in speaking on the subject?

A. Filature is the name of the factory in which the silk is reeled [444] from the cocoons.

Q. Is there any other animal matter than what you have named present in No. 1 and 2 steam waste silk or gets into it in the preparation or handling of it?

A. There should not be any. There is some human hair, a good deal of it, but it shouldn't be there.

Q. But it is there.

A. Yes, there is a good deal of human hair.

Q. Mr. Cheney, describe as minutely as you can the reeling of silk and then what follows from it by way of waste silk.

A. Well, the cocoons are sold by the individual producers to the filatures. The first thing the filatures do is to kill the worm inside the cocoon, by heat; then as the cocoons are used they are placed in a small kettle of boiling water to soften the gum, and the very outside fibres of the cocoon are taken off as being too coarse for reeled silk. This goes as part of the waste product. When these outside fibres have been removed, the operative takes hold of the outside end of the fibre and, by combining the ends from four cocoons or five cocoons, passes them over a reel and these four or five fibres are wound on a reel, the cocoons meanwhile turning freely in the boiling water. When the operative has unwound a cocoon down to the proper amount,

(Deposition of Philip Cheney.)

a new cocoon is put in in place of this one and the residue of fibres is discarded into the waste as being too thin or fine a fibre for use in reeled silk.

Q. And that which is discarded goes to make up what is known as waste silk? A. Waste silk.

Q. Then what takes place after that; what is the next step in the process of obtaining the fibre for manufacture?

A. The filatures assemble the various grades of waste and they are dried and sold as a waste product of the filatures. [445] This waste is a mixture of the fibre and the silk gum.

Q. In what condition do they put it by way of getting it to the manufacturers, in bales, or how?

A. The form of putting up the different wastes varies.

Q. Confine it to Canton steam waste.

A. In Canton it is more or less an uneven product; that is, there is no definite form, it is more or less a mass of waste. It is not straightened out the way it is in most of the European filatures.

Q. And is it baled?

A. It is put up in bales in Canton. Usually one bale consists of one picul of waste silk or 133 pounds.

Q. And how is it prepared for shipment, the bales?

A. The bales are wrapped in some cases with burlap and in other cases with straw matting.

Q. What kind of straw matting?

A. I don't know; it is regular woven straw mat-

(Deposition of Philip Cheney.)

ting; I don't know how it is made.

Q. Do you know what the straw is made from?

A. I don't know what the straw is made from; presumably rice straw, but I am not sure of that.

Q. With the steam waste put up in that condition, it is then shipped to the factory, for instance, to your plant, for manufacture?

A. We buy through commission houses; the silk is assembled by them and invoiced and shipped direct to us, in bond.

Q. In these bales as you have described them?

A. In bales.

Q. The shipment, coming to you in that condition, is still in its raw state with the gummy substance on the fibre?

A. Yes, there is more or less of the gum.

Q. Is it purchased by pound or otherwise?

A. The Canton steam waste is purchased by the pound, so much a [446] pound for the complete waste, that is, the fibre and gum mixed.

Q. Then when it comes to your plant, what do you do with it first?

A. The silk is opened and then is boiled out with soap and water.

Q. Describe as best you can, in a minute way, the process and the purpose of boiling and all those things connected with the treatment.

A. Well, the first thing necessary is to remove the silk gum from the fibre. That is done in various ways, either by bacterial decomposition of the gum,

(Deposition of Philip Cheney.)

or, more commonly, by the boiling off of the gum in soap and water.

Q. Describe the first method and the term of it—how it was used originally and if it was abandoned why it was, down to the present process of removing the gum from the fibre.

A. Well, I think the boiling off process is the older process. The maceration is used as being a cheaper process because of the fact that no soap is necessary, which is very expensive.

Q. Describe the maceration process.

A. In the maceration process the silk is placed in a vat with water and kept at a temperature of approximately 98 degrees Fahrenheit. The bacterial action starts almost immediately and this action continues, under favorable conditions, until the gum is entirely decomposed, when the action is stopped because the bacteria would have nothing more to feed on. Under favorable conditions it takes about 12 days to decompose the gum on a mass of 300 pounds of silk waste.

Q. At what temperatures will decomposition take place under the maceration process, favorable or unfavorable conditions?

A. Well, the most favorable condition is 98° Fahrenheit, and decomposition will go on down to the freezing point and up to the boiling point, the further it goes from the 98° being more of a retarding effect on the decomposition.

Q. You mean by retarding effect that it merely slows the process? [447]

(Deposition of Philip Cheney.)

A. Slows the bacterial action.

Q. It in no manner destroys the bacterial action?

A. No, not until actual freezing or actual boiling.

Q. So that you take the 98° Fahrenheit as the most favorable degree of heat in which the bacteria will work the best?

A. Yes, that is the usual temperature at which bacterial work is done—blood heat.

Q. Describe the method by boiling process for removing the gum.

A. In boiling, the silk is boiled in water containing approximately 30% of soap by weight of silk. This process takes from an hour and a half to two hours to entirely degum the waste.

Q. Now you have got the gum removed from the fibre under both processes described. What do you do next after the gum has been removed from the fibre, in both instances?

A. In both instances the silk is washed; in the case of the boiled silk to remove the soap, and in the case of the macerated silk to remove the decomposed gum which adheres to the fibre and must be washed out. Then after the washing the silk is dried in drying ovens and then goes to the dressing mill for the dressing process. The dressing process consists, in the case of steam waste, of first opening the waste on what are known as openers, making the waste into the form of a lap, which is fed to the first draft pickers. From the pickers the waste goes to the first draft dressing frame. The foreign matter and short fibres which are combed by the

(Deposition of Philip Cheney.)

first draft dressing room are returned to the second draft pickers, and in turn the second draft dressing frame. In like manner the third draft goes through the same process. In the case of short waste this leaves a residue of noils, of which the fibres are too short for more dressing. These noils are either carded and combed or sold as fourth draft noils.

Q. For what purpose are those used? [448]

A. They are used in the manufacture of noil yarns and also by woolen manufacturers for mixture with wool.

Q. For what are the other parts of the product used?

A. The dressed silk, first, second and third drafts, and also the fourth draft, and combed silk, are used in the manufacture of spun silk.

Q. In the maceration process, Mr. Cheney, what objectionable odor emanates from the process, if any?

A. The reason we do not macerate now is, it created such a smell that it was a public nuisance. We had to stop macerating because the odor given off by the maceration was strong, we couldn't live in the same town with it. A gas is given off by the bacterial action, most of which is sulphureted hydrogen.

Q. Any ammonia thrown off?

A. There is a faint trace of ammonia in the gases which are given off but I never measured exactly the amount of ammonia produced, but you can get a faint ammonia smell from the gases liberated. It

(Deposition of Philip Cheney.)

is more marked in the case of silk that is more nearly dry. That is, when submerged in water the ammonia given off is not so great as in the case where the silk is simply damp but not saturated.

Q. And in working under the maceration process and those conditions did you attempt to avoid the deleterious effect, if any, of those gases on the part of the workmen?

A. We made a great many experiments before we gave up the macerating process, to eliminate the bad odors. We experimented with various chemicals and also we vented the odors up the main chimney pipe of the power station.

Q. What did you have by way of carrying off these gases—what was the purpose of carrying them off in so far as the men working on the product in the maceration process is concerned; suppose you didn't carry them off? [449]

A. There would be no deleterious effect, I think, on the health of the men working in those odors, but the odor escaping from the mill spread all over the town. We simply tried to eliminate the odor, not as a health measure, but simply because we could not stand such a smell in the town.

Q. If it were confined in a room, would a man be able to stand the smell—if it was confined, instead of being let off?

A. If he had a strong stomach, he could.

Q. It affects some men and others it doesn't?

A. Yes.

Q. Now, then, so far as Canton steam waste is

(Deposition of Philip Cheney.)

concerned, at the filatures, in order to reel off the long skeins, or yarn, whatever you call them, in order to reel the silk, they keep the cocoons in warm water? A. In boiling water.

Q. Hence, it is partially degummed by that process, isn't it? A. Yes.

Q. And the balance of it, then, is allowed to dry on the fibre? A. Yes.

Q. Perfectly dry. So that wetting the gum and then allowing it to dry on the fibre, does it or not affect the fibre?

A. It is pretty hard to say what actual damage would be done to the fibre. The policy of all silk manufacturers, from the start to finish, is never to wet silk if you can help it, for the reason that there is some damage to the fibre by wetting—that is, alternate wetting and drying.

Q. Suppose that the silk waste was saturated with sea water, containing the ingredients of which you have described, and it was allowed to remain in that sea water or saturated by the water say from 10 to 14 days,—what effect, if any, would the action of the sea water have upon the fibre under those conditions? [450]

A. I should say the only damage to the fibre would be from the chemical action from the alkali in the sea water.

Q. Would the fibre, if at all, be attacked within the period already named to you?

A. Yes, the fibre would be attacked by the chemical action theoretically as soon as the chemicals

(Deposition of Philip Cheney.)

touch the fibre. The measure of damage would be so infinitestimal for some time that it could not be measured, but theoretically the action would be immediate.

Q. And would gradually occur during the period it was submerged or exposed to the sea water?

A. Yes.

Q. Assume this state of facts as true: A cargo of Canton steam waste silk, consisting of 1,000 bales, was being transferred by ship from Canton to Tacoma, Washington. As the ship neared the port it grounded, a hole was stove in its side or bottom and the sea water was let in and got into the cargo of waste silk and saturated, we will say, completely, 868 bales. The ship grounded on the 30th day of July, 1918. It then remained at that place for eight or nine days and then was towed through the Straits into Puget Sound and past Seattle and to the port of Tacoma, where the ship started to discharge on August the 10th, and continued thereafter to discharge the cargo until the 12th of August, 1918. The bales were then exposed to the sea water which had come into the ship, alternating back and forth by being pumped out, from the period of July 30th to August 10th and August 12th. It was then discharged upon the docks of the Chicago, Milwaukee & St. Paul Railroad Company at Tacoma. When the bales came out of the hold of the ship they were then, I will term it, fuming and smoking and apparently fer-

(Deposition of Philip Cheney.)

menting. Under the conditions that I have named to you, Mr. Cheney, in order to properly preserve that cargo, what would have been the first thing to do by one who was acquainted with the cargo, it [451] being waste silk.

A. I presume you mean what would be the best thing to do to cause the least damage to the silk.

Q. Yes.

A. Why the simplest and best thing to do would be to open the bales and spread them out in the sun to dry.

Q. Allowing them to dry, having been attacked by sea water, would that in any way injure the fibre?

A. I don't think it would injure the fibre except as to discoloration; it would cause discoloration of the fibre.

Q. Would the action of the sea water during the period that the cargo lay in the ship's hold, from July 30th to August 10th and 12th, have discolored the fibre? A. Yes.

Q. What other method might have been used in order to have minimized the damage to the cargo, when it was discharged on the docks?

A. Why immediate degumming of the silk would of course, be the best thing for the silk, but from a practical point of view I should say that drying was the proper course to take.

Q. How would you have gone at it to have dried it?

(Deposition of Philip Cheney.)

A. I would have opened the bales and spread them out in the sun.

Q. Suppose that in the process it was exposed to the ordinary elements which might take place at Puget Sound port. It may have rained and the sun shone, alternating at that time of the year. We will assume there was very little rain. Would the fibre have been affected at all by that method of drying, if it was finally dried?

A. Why, if it had dried immediately the fibre would not have been affected. Alternate wetting and partial drying—every time the silk was wet would start decomposition of the gum.

Q. But that wouldn't reach the fibre itself unless it was allowed to stay a great length of time, I assume. A. No. [452]

Q. In this case that I have in mind, and the one before you, the bales, as I said, were discharged on the dock of the Railroad Company between August 10th and 12th and were allowed to remain in the baled condition until August 16th to September 3d when it was first taken and allowed to be spread out for drying. Would the condition in which the bales or the waste silk were allowed to remain during that period, be detrimental or not to the fibre?

A. How many days was that?

Q. That would be about 17 days. Allowing it to remain in its bundled or baled condition, in the condition I have described to you, would that be detrimental or not?

(Deposition of Philip Cheney.)

A. Yes, I should say it would be.

Q. Now, from your experience and knowledge on the subject, would you have attempted to ship that cargo in closed cars, a boxcar or refrigerator-car, from Tacoma, Washington, to Providence, Rhode Island, say under a freight service which would take from 18 to 20 days, rather than drying it?

A. No, I should have dried it, for the benefit of the silk; that is, every day it was left in that condition it would add to the weakening of the fibre.

Q. And that would be true, would it not, if it was practical to have shipped it by what is known as fast train service or cars attached to the passenger train, in going from Tacoma to Providence, which would be in the neighborhood of six or seven days?

A. It would be almost directly proportional to the number of days it took.

Q. In your experience with degumming silk, the higher the temperature the faster the degumming takes place?

A. The fastest degumming occurs at 98° Fahrenheit. [453]

Q. What happens over and above that?

A. The action of bacteris is reduced directly according to the increase of temperature above that point, up to the boiling point, when it ceases altogether.

Q. In maceration does the fermentation which

(Deposition of Philip Cheney.)

occurs cause a heat above 98°, if it was allowed to take its natural course?

A. I have had no experience in that for the reason that our maceration has been done in a saturated condition; in other words, the decomposition does not raise the temperature of the water in which the silk is lying; that has to be raised by mechanical means to keep it at 98°.

Q. Decomposition, however, occurs as soon as there is bacterial action.

A. Yes, that is, up to the point where the gum is entirely decomposed.

Q. You received from the Chicago, Milwaukee & St. Paul Railway Company a sample of Canton steam waste through the American Express Company, with the seals unbroken.

A. Yes, I received the samples with the seals unbroken.

Q. Were you asked to examine the sample and determine to what extent, if any, the fibre had been damaged, assuming, as I said, that it had been exposed and saturated with salt water. Did you make that examination?

A. Yes, I processed this sample.

Q. What did you do by way of determining the amount of damage, if any, to the fibre itself?

A. In order to get a comparison of the damage, I took a sample of Cheney Brothers steam waste, No. 1 quality, of approximately the same weight. These two samples were run through the same ex-

(Deposition of Philip Cheney.)

periments, side by side, as a comparative test.

Q. Detail the process that you put it through with reference to determining the result. [454]

A. The first step taken was to degum a portion of both samples. This silk, that is, the part that was degummed by boiling, was then processed through the dressing mill in the ordinary way, with extreme care not to have any loss by mistake or mixture. I personally attended to processing these samples and am sure that there was no mistake in either case.

Q. Detail a little more, before I get at the final result of your finding, the various processes you put it through and the drafts that you made of the silk in order to determine its yield.

A. Both samples were put through the regular dressing process, first dressing out the first draft, then the second, then the third, and accurate weights were kept of the amount of dressed silk obtained in each one of these drafts and also the residue of noils.

Q. So that in determining the yield you did the same thing that would be done if you were processing the silk for manufacture?

A. Yes, the same processes were gone through with, with the exception that all the figures on both of those samples are made on conditioned weight.

Q. The sample which you received from the Railway Company, how did that compare with the sample which you used to run alongside of it

(Deposition of Philip Cheney.)

which was No. 1 extra selected waste silk, in so far as it had the usual amount of gum on it or not?

A. The loss in weight by degumming process in the case of the sample obtained from the railroad was 23.26% of the raw weight.

Q. That loss would be what, with reference to yield? Was it merely gum or part of the fiber?

A. That 23% consisted of the loss in gum during the boiling process.

Q. What loss, if any, is there which occurs when you degum general waste silk which has not been exposed as the sample which I sent you? [455]

A. The sample of Cheney Brothers' steam waste, which was run as a comparison to this sample, in the degumming lost 36.14% as against 23.26% for the railroad sample.

Q. The sample which you used by way of comparing, what we will call in the record as Cheney Brothers' sample, was the very best grade of Canton steam waste which is sold to the manufacturer?

A. Yes, it is the best grade of steam waste which is on the market.

Q. Is it better than what is known as the ordinary No. 1 and 2 Canton steam waste?

A. It is a higher grade from the fact that it is opened to a greater extent; that is, the waste is pulled apart and teethed out and to a certain degree straightened.

Q. Now having testified as to what you in fact did in the way of processing the sample for the

(Deposition of Philip Cheney.)

purpose of determining its yield, detail the result of your findings.

A. The sample from the Chicago, Milwaukee & St. Paul Railway lost in degumming 23.26% as against 36.14% for Cheney Brothers' waste. The first draft yield from the raw on railroad sample was 10.95% as against 14.41% on Cheney Brothers. The second draft yield from the raw on railroad sample was 12.35% as against 13.68% on Cheney Brothers. The third draft yield from the raw on railroad sample was 7.45% as against 6.89% on Cheney Brothers. The fourth draft noils, railroad sample, 38.89% as against 27.73% on Cheney Brothers. The loss which is not directly accounted for, consisting of dust and fly, in the case of the railroad sample was 7.1% of the raw, and in the case of Cheney Brothers' sample as 1.15%. The railroad sample showed a very noticable discoloration of fibre.

Q. Now what was the total difference between the railroad sample and Cheney Brothers' sample with reference to the drafts?

A. The total yield in the case of the railroad sample in dressed silk was 30.75% from the raw. In the case of Cheney Brothers' sample this yield was 34.98% from the raw. [456]

Q. Detail whatever other difference there is between the two samples that you have not so far detailed.

A. The noticable difference 'tween these two

(Deposition of Philip Cheney.)

samples, not considering the discoloration, is the loss in percentage during the boiling off process, the railroad sample losing 23.26% against the Cheney Brothers' sample of 36.14%. That shows that the railroad sample had already lost approximately 13% in gum before it was received at South Manchester, as steam waste invariably loses from 36 to 40% during the boiling off of standard waste.

Q. That particular loss, however, does not enter into the yield, does it?

A. It doesn't figure in the figures I have given but would figure in the relative value of the two samples, pound for pound, as received.

Q. To make it clearer, have you reckoned the differences between the railroad sample and the Cheney Brothers' sample in dollars and cents? If you have, detail that into the record.

A. I have made figures, basing both samples on a theoretical value of $1 a pound. This shows that the railroad sample, pound for pound, is worth 8.9 less than the Cheney Brothers' sample—that is, pound for pound, as received by me.

Q. What was the market value of Canton steam waste, No. 1 and No. 2, between the months, say of July and October, 1918.

A. I can only base these relative values on quotations received from waste silk importers during that period, from those through whom we buy our waste. On June 3, 1918, No. 1 Canton steam waste was quoted at $1.09 per pound f. o. b. South Man-

(Deposition of Philip Cheney.)

chester. No. 2, on the same date, was quoted at 69.6 cents per pound. On October 17, 1918, No. 1 was quoted at $1.42 per pound and No. 2, on the same date, at 97.6 cents per pound. We had no quotations during August of that year. [457]

Q. Now you found considerably more of noils in the yield of the railroad sample as against Cheney Brothers' sample. What were noils worth during the period, say of August and September, 1918.

A. No. 4 noils at that time were worth 75 cents a pound.

Q. How would you classify the noils in the yield of the railroad sample which you found?

A. They would have sold at that time for 75 cents per pound.

Q. To give your general conclusion on the railroad sample as against the sample of Cheney Brothers, what difference is there, then, in the total loss or damage of the railroad sample as compared with Cheney Brothers' sample.

A. Figuring the yield of these two samples on the basis of $1 per pound for each sample in the raw, if Cheney Brothers' sample were worth $1 per pound, the railroad sample in August, 1918, would have been worth 8.9% less or 91.1 cents per pound.

Q. That difference, would it or would it not be traced to the injury merely to the fibre?

A. Yes, during 1918?

Q. Yes, confine yourself to that period.

A. The discoloration did not figure then; now it would.

(Deposition of Philip Cheney.)

Q. Why wouldn't you figure discoloration during that period as an element of damage to the waste silk?

A. Because most of the spun silk at that time was taken by the Government for cartridge bag cloth, into which the element of color did not enter.

Q. How about the use of noils at that time?

A. Approximately all the noils purchased at that time were used in making noil yarn for Government uses and in the same way discoloration would not affect the value.

Q. State whether or not you took the same quantity of the sample of the railroad company and the same quantity of the Cheney Brothers' [458] sample when you processed it, and, if so, tell whether or not it would make any difference in your calculations.

A. The exact number of drams in the two samples were not the same in both cases, but all figures are based on a percentage from the weight taken, which would not affect the result of any figures which I have given. These weights are all based on conditioned weight of the silk in every case. I mean by conditioned weight that weights were taken under the condition of absolute dryness of the sample weighed.

The defendant offers in evidence Defendant's Exhibits No. 3, No. 4, No. 5 and No. 6, as part of the examination of the witness, Philip Cheney.

(Deposition of Philip Cheney.)

(Defendant's Exhibit No. 3—Report of yield of Railroad sample.

Defendant's Exhibit No. 4—Report of yield, Cheney Bros. sample.

Defendant's Exhibit No. 5—Values in dollars of Railroad sample.

Defendant's Exhibit No. 6—Values in dollars of Cheney Bros. sample.)

Q. State the time when you made the examination of the samples which you have heretofore detailed.

A. Those samples were processed December 20, 21, and 22, 1920.

(Defendant offers in evidence Defendant's Exhibits 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18, as part of the examination of the witness, Philip Cheney.)

Q. Mr. Cheney, describe in detail, as you go along, the waste silk contained in the jar and marked "Defendant's Exhibit 7."

A. This No. 7 is a portion of the sample, in the raw state, received from the Chicago, Milwaukee & St. Paul Railroad.

Q. Which you used in determining the yield?

A. Which I used in determining the relative yield.

Q. Describe Defendant's Exhibit No. 8.

A. No. 8 is the sample of Cheney Brothers' steam waste, in the raw, which was processed for comparison with the railroad sample.

Q. Describe Exhibit No. 9.

(Deposition of Philip Cheney.)

A. No. 9 is a portion of the railroad sample showing the silk after degumming. [459]

Q. Describe No. 10.

A. No. 10 is a portion of the Cheney Brothers' silk showing the waste after degumming.

Q. Describe Exhibit No. 11.

A. No. 11 is the first draft dressed silk obtained from the railroad sample.

Q. Describe Exhibit No. 12.

A. No. 12 is the first draft silk obtained from the Cheney Brothers' sample.

Q. Describe Exhibit No. 13.

A. No. 13 is the second draft silk obtained from the railroad sample.

Q. Describe Exhibit No. 14.

A. No. 14 is the second draft silk obtained from Cheney Brothers' sample.

Q. Describe Exhibit No. 15.

A. No. 15 is the third draft silk obtained from the railroad sample.

Q. Describe Exhibit No. 16.

A. No. 16 is the third draft silk obtained from the Cheney Brothers' sample.

Q. Describe Exhibit No. 17.

A. No. 17 is the noils obtained from the railroad sample.

Q. Describe Exhibit No. 18.

A. No. 18 is the noils obtained from the Cheney Brothers' sample.

(Deposition of Philip Cheney.)

Cross-examination by Mr. LYETH.

Q. The reeled silk, as it comes to this country, has to be degummed also, does it not?

A. Yes, before it is finished. The reeled silk is usually woven in the gum and then is degummed after it is woven.

Q. So that the raw silk and the silk waste is of approximately the same raw material, is it not? [460]

A. Yes, it is obtained from the same cocoon.

Q. I understand you to say you made no particular experiments as to the gases that come off the silk when it is in a wet condition as distinguished from soaking in water.

A. The fumes from silk that is damp but not in water are more distinctly of ammonia than when the silk is under submersion.

Q. There is more H^2s coming off when it is damp than when it is in immersion?

A. I am not sure of it; I should say yes.

Q. You stated in reference to the hypothetical question that was put to you on the direct examination that the exposure of the silk in opening up the bales to the elements, alternate wetting and drying would injure the fibre in time. A. Yes.

Q. How much in any given time you haven't any means of determining, how much injury to the fibre would occur.

A. No, I have no method of determining the direct injury to the fibre.

(Deposition of Philip Cheney.)

Q. Well, Mr. Cheney, wouldn't it be better, from the point of view of the preservation of the silk, assuming the facts substantially as put to you in the hypothetical question on direct examination, to keep the silk as wet as possible and put it into manufacture and boil it off as soon as possible, rather than to open up the bales and subject them to the elements for several months and the alternate wetting and drying?

A. Yes, if a bale, as often has happened, arrived here wet, I should boil off that waste immediately without drying it.

Q. Well, you have had wet bales arrive frequently, haven't you?

A. Not frequently but infrequently. Once in awhile we get a bale that has been dropped overboard.

Q. You immediately put that into manufacture?

A. I degum that without drying it. [461]

Q. That is the best way to preserve it?

A. Yes, if it is practical to do it.

And to further prove the issue on his part, the defendant offered in evidence an American Railway Express Company receipt, relating to the shipment of a portion of the waste silk, identified as being a portion of Defendant's Exhibit No. 22, which receipt was received in evidence and marked "Defendant's Exhibit No. 30," and the same is transmitted to the Circuit Court of Appeals with all the other original exhibits in the case.

And, in connection with the deposition of Philip Cheney, the defendant offered, and the Court received in evidence, the several exhibits referred to in said deposition by numbers 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, the same being identified for this record by corresponding numbers as follows:

Exhibit No. in Deposition	Exhibit No. in this Record.
3	31
4	32
5	33
6	34
7	35
8	36
9	37
10	38
11	39
12	40
13	41
14	42
15	43
16	44
17	45
18	46

[462]

The text of said exhibits, numbered respectively 31, 32, 33 and 34, is as follows:

Exhibit No. 31.

(No. 3 in Cheney Deposition.)

LABORATORY TEST.

No. —— Date ——

EXAMINATION OF Canton Steam Waste.

FROM The Chicago, Milwaukee & St. Paul R. R.

Quantity. Sample. Price. Received

REPORT: On Yielding.

Absolute weight		Drafts	Noils	Loss	Boil-off	Raw Stock
		%	%	%	%	%
	Grams.					
Raw stock	486.54					100.00
Boiled-off	113.19				23.26	
Fibre grams	373.35					
1st draft gr.	53.25	10.95				
2d " "	60.10	12.35				
3d " "	36.20	7.45				
Noils "	189.20		38.89			
LOSS "	34.60			7.10		
Total grams	373.35	30.75%	38.89%	7.10%	23.26%	100.00

COMMENT: Stock shows a bad brownish discoloration.

CHENEY BROTHERS,

Conditioning and Testing Dept.

(Signed) FRED SCHMUTZ,

In Charge. [463]

Exhibit No. 32.

(No. 4 in Cheney Deposition.)

LABORATORY TEST.

No. —— Date ——

EXAMINATION OF Canton Steam Waste.

FROM Cheney Brothers.

Quantity. Sample. Price Received

REPORT: On Yielding:

Absolute weight		Drafts	Noils	Loss	Boil-of	Raw Stock
		%	%	%	%	%
	grams.					
Raw Stock	417.48					100.00
Boiled-off	150.88				36.14	
Fibre grams	266.60					
1st draft gr.	60.15	14.41				
2d " "	57.13	13.68				
3d " "	28.75	6.89				
Noils "	115.75		27.73			
LOSS "	4.82			1.15		
Totals grams	266.60	34.98%	27.73%	1.15%	36.14%	100%

COMMENT:

CHENEY BROTHERS,
Conditioning & Testing Dept.
(Signed) FRED SCHMUTZ,
In Charge. [464]

Exhibit No. 33.

(No. 5 in Cheney Deposition.)

STOCK—RAILWAY COMPANY.

100 lb. Waste Silk, at $1.00 per lb.	$100.00
Less 38.89 lbs. No. 4 Noils at 75¢ per lb. ..	29.16
	$ 70.84

NET COST OF MATERIALS.

PRODUCTION.		COST OF MFG.		
1st draft,	10.95 lbs.	Labor	.663 per lb.	
2d draft,	12.35 lbs.	Expense,	.322 per lb.	
3d draft,	7.45 lbs.	Materials,	.127 per lb.	
Total	30.75	at	1.112	34.19
		Total cost		105.03

DISTRIBUTION OF COST.

PRODUCT.		PRICE	AMOUNT
1st draft, ...	10.95	3.597	39.28
2d draft, ...	12.35	3.457	42.69
3d draft, ...	7.45	3.097	23.06

This waste is worth about 8.9% less than Cheney Bros. [465]

Exhibit No. 34.

(No. 6 in Cheney Deposition.)

CHENEY BROS.

100 lb. Waste Silk at $1.00 per lb.	$100.00
Less 27.73 lbs. No. 4 Noils at 75¢ per lb. ...	20.80
	$ 79.20

NET COST OF MATERIALS.

Production.		Cost of Mfg.		
1st draft,	14.41 lbs.	Labor,	.663 per lb.	
2d draft,	13.68 lbs.	Expenses,	.322 per lb.	
3d draft,	6.89 lbs.	Materials,	.127 per lb.	
Total	34.98 lbs.	at	1.112	38.90
			Total cost.....	118.10

DISTRIBUTION OF COST.

Produce.		Price.	Amount.
1st draft, ...	14.41	3.534	50.91
2d draft, ...	13.68	3.384	46.29
3d draft, ...	6.89	3.034	20.90

Said exhibits numbered respectively from 7 to 18, inclusive, in the Cheney deposition are samples contained in glass jars, which are transmitted to the Circuit Court of Appeals with the other original exhibits.

Testimony of Frank G. Taylor, for Plaintiff (Recalled in Rebuttal).

And thereupon, without offering other evidence the defendant rested, and the plaintiff recalled FRANK G. TAYLOR, who testified IN REBUTTAL as follows: [466]

Q. (By Mr. LYETH.) Mr. Taylor, were you present in court when Mr. Barkley testified?

A. I was.

Q. And you heard him testify regarding the selection of a cargo surveyor? A. I did.

.Q will you tell the Court whether Mr. Barkley

(Testimony of Frank G. Taylor.)

at any time prior to the 24th day of August, when they rejected the cargo finally and definitely, said anything to you about selecting Lloyd's agent, or having Lloyd's agent select the cargo surveyor?

A. No mention—

Mr. KORTE.—I object to that; he covered that point. That is not rebuttal. He told his story in the beginning as to what talk he had with Mr. Barkley, and this is only reiterating it.

The COURT.—My recollection is that he testified on the subject, but if you are in doubt about it you can ask him again.

Q. (Mr. LYETH.) On the 21st of August, when Mr. Barkley told you that the road would forward the silk, after you had been there one or two times, did Mr. Barkley remind you of your agreement to abide by the Company's refusal to handle the goods if an outside cargo inspector were selected by the railroad and considered it unsafe?

A. He did not—

Mr. KORTE.—That is not rebuttal.

The COURT.—I will let him answer. I think he testified on the subject in chief, but I may be mistaken about it.

Q. (Mr. LYETH.) How long have you been in the marine insurance business?

A. Twenty years.

Q. Do you know who Lloyd's agent is, and did you know who Lloyd's agents were in Seattle?

A. I did, very well. [467]

Q. How long have you known them?

(Testimony of Frank G. Taylor.)

Mr. KORTE.—I think that is irrelevant and immaterial. That was brought out on cross-examination with reference to Lloyd's agent.

The COURT.—He can answer it.

Q. State how long, approximately.

A. Ever since they were appointed; I would know is as soon as they were appointed.

Q. Mr. Taylor, when you first went to see Mr. Barkley and explained the situation to him, did you tell him that this waste silk was wanted by your people in the east for war purposes? A. I did.

Mr. KORTE.—That is part of the direct case, and there is no claim here of that kind, and this is irrelevant and immaterial.

The COURT.—That is the first intimation of that kind in the trial. In what way do you consider it important in this case?

Mr. LYETH.—Simply this: I do not know what the other side is going to argue about this question of damages.

The COURT.—I will let him answer it then, as showing the necessity of the shipment. A. I did.

And thereupon, without offering other evidence, both parties rested.

The case was argued before the Court orally by counsel appearing for the respective parties, and was submitted and taken under advisement by the Court.

Both parties requested the Court to make special findings of fact. The Court at that time directed the counsel for the respective parties to prepare

and submit in writing their proposed findings of fact and conclusions of law, and, in compliance with that [468] direction, the defendant submitted the following as his proposed

Findings of Fact and Conclusions of Law.

FINDINGS OF FACT.

1. The paragraphs numbered "first" and "second" of the plaintiff's complaint are not controverted and the allegations thereof are true.

2. On the 21st and 24th days of June, 1918, four bills of lading were issued at Canton, China, for the transportation of one thousand (1,000) bales of silk waste from Hong Kong, China, to Tacoma, Washington, by the steamship "Canada Maru," and from Tacoma, Washington, to Providence, Rhode Island, on the Chicago, Milwaukee & St. Paul Railway and connecting lines, and said 1000 bales were received in apparent good order on board of the "Canada Maru."

3. On the 30th day of July, 1918, the "Canada Maru," with said 1000 bales on board, met with a maritime disaster by striking on rocks and stranding on the coast of Washington near Cape Flattery, and said vessel was thereby so badly damaged that her hold and cargo space were filled with sea water and eight hundred and sixty-seven (867) of said bales were completely submerged in the hold of said vessel.

4. Said vessel was rescued from her perilous position and towed to Tacoma, where she arrived on the 10th day of August, 1918, and from thence pro-

ceeded to a dry dock for necessary temporary repairs before commencing to discharge cargo. After returning to Tacoma she commenced discharging said bales of silk on the 12th day of August and completed discharging said bales on the 16th day of August, 1918.

5. When discharged from said vessel, one hundred and thirty-three (133) of said bales were found to be undamaged [469] and the same were promptly transported to destination. The other 867 bales were completely saturated with sea water, whereby heat and malodorous fumes emanated therefrom to such an extent that the stevedores were able only with great difficulty to remove the same from the hold of said vessel, and, after being unloaded on the dock, heating and diffusion of malodorous fumes continued to such an extent that, after inspection by a Cargo Surveyor, said 867 bales were, by agents of the Chicago, Milwaukee & St. Paul Railway Company and said Cargo Surveyor, deemed to be dangerous to handle, dangerous to carry by railway from Tacoma to Providence, and unfit for transportation without being reconditioned.

6. All of said 1000 bales were insured against damage in transit from Hong Kong to Providence by the Atlantic Mutual Insurance Company; and during the time of the unloading of the said bales from said vessel, Frank G. Taylor, representing the Underwriters, by direction of the Atlantic Mutual Insurance Company, visited the premises where said wet bales were, for the time being, situated, and became informed as to the condition thereof, and,

after being definitely informed by agents of the Chicago, Milwaukee & St. Paul Railway Company that the same were deemed to be unfit for transportation and that said Railway Company would not assume the risk of transporting the same from Tacoma in their wet condition, caused said wet bales to be removed from Tacoma to Seattle for the purpose of being reconditioned by drying the same, and entered into a contract with the Pacific Oil Mills, at Seattle, to perform the service of drying and rebaling the contents of said bales after being dried and redelivering the same, which contract was performed by said Pacific Oil Mills, and for said service said Taylor paid Five Thousand ($5,000) Dollars. [470]

7. That the time consumed in completing said operation of drying extended until the 20th day of January, 1919.

8. That, after being reconditioned as aforesaid, all of the contents of said 867 bales were, by the Chicago, Milwaukee & St. Paul Railway and connecting lines, transported from Seattle to, and delivered at, Providence, Rhode Island, that service being completed on the 30th day of January, 1919.

9. At the times referred to in these findings, the steamship "Canada Maru" was being operated by a foreign corporation, namely, Osaka Shosen Kaisha, Ltd., and the four bills of lading aforesaid were issued by said foreign corporation in its own behalf and as agent for the Chicago, Milwaukee & St. Paul Railway Company, then being operated by the Director General of Railroads, and freight for the through transportation service was prepaid at the

tariff rates, as to the railway service, prescribed in tariffs previously filed with the Interstate Commerce Commission and then in effect.

By three of said bills of lading, covering 700 of said 1000 bales, the same were consigned to the order of Heidelbach Ickelheimer & Co., New York, and, by the other of said bills of lading, covering 300 of said bales, the same were consigned to the order of Goldman, Sachs & Co., of New York, and all of said bills of lading, after being endorsed by said consignees, were received by the plaintiff herein on the 7th day of August, 1918.

10. On the security of letters of credit all of said 1000 bales were sold by the manufacturers in China on a credit of four (4) months from the date of shipment thereof from China; the consignees aforesaid, without receiving immediate payment of the purchase price for said merchandise, at the time of delivering said bills of lading to the plaintiff, took from said plaintiff a trust receipt, in effect stipulating that said merchandise belonged to said consignees until the purchase [471] price aforesaid should be paid, which payment was made at the time of, and not before, the expiration of said four months period of credit, which was on or about October 24th, 1918, and at that time, by said payment, the plaintiff acquired ownership of said merchandise.

11. In whatever way said merchandise became damaged or diminished in value, subsequent to the unloading thereof from the "Canada Maru," such damage or impairment of value occurred and was

fully consummated during the time intervening between the 12th day of August and the 24th day of October, 1918, during which time the consignees, Heidlebach Ickelheimer & Co. and Goldman Sachs & Co., named respectively in said bills of lading, were owners of said merchandise.

12 The market value of the silk waste contained in said 867 bales, on arrival at Providence in the due and ordinary course of transportation, if then undamaged, would have been $125,653.78; that gross sum being arrived at by computation of the market value of two grades of silk waste, No. 1 grade being at the rate of $1.51 per pound, of which there was 46,613 pounds, and No. 2 grade at .87 per pound, and there is a total failure on the part of plaintiff to introduce any evidence respecting the weight of the silk of said No. 2 grade; and there is a total failure on the part of plaintiff to prove the difference in market value between the sound value—viz: $125,653.78—and the market value of said merchandise at the time of its delivery at Providence in the state it was after being reconditioned as aforesaid.

13. That in the months of February and March, 1919, the Atlantic Mutual Insurance Company paid the plaintiff sums of money aggregating Seventy-seven Thousand Seven Hundred Fifty-two and 96/100 ($77,752.96) Dollars, and there is a total failure on the part of plaintiff to prove that any damage by deterioration [472] of said merchandise, or expenses chargeable as a loss incidental to the transportation thereof, amounts to any sum in

excess of said $77,752.96, paid by said Insurance Company as aforesaid, whereby the plaintiff, previous to the commencement of this action, received full compensation for whatever loss or damage it may have sustained in connection with the transportation of said merchandise.

14. That each of the said four bills of lading contains a stipulation of the following tenor:

> "Any carrier or party liable on account of loss or of damage to any of said property, shall, by right of subrogation, have the full benefit of any insurance that may have been effected upon or on account of said property."

15. That each of said four bills of lading contains a stipulation of the following tenor:

> "2. Except in the case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage or delay occurring while the property described herein is stopped and held in transit upon request of the shipper, owner or party entitled to make such request; or resulting from a defect or vice in the property, or from the riots, or strikes."

16. The defendant did not make, or enter into, any agreement for transportation of said 867 bales while in the wet condition in which they were when discharged from the "Canada Maru," or any agreement whatsoever respecting the transportation of

said merchandise other than, or different from, the written contract contained in said four bills of lading, nor at any time accept said 867 bales, or any part thereof, for transportation without being reconditioned.

17. The defendant did not, by any act or omission, cause, or contribute to the cause of, any damage whatever or impairment of value of said merchandise, or any part thereof, or in any manner fail to fully and completely perform his contract for that part of the transportation by his railroad. [473] And now, upon the facts aforesaid, the Court makes and announces the following as his

CONCLUSIONS OF LAW.

1. The plaintiff herein is not the real party in interest nor entitled by law to maintain this action.

2. The defendant is not, by any act or omission, guilty of any breach whatever of the contract sued on herein.

3. The defendant is entitled to have a judgment in his favor that the plaintiff take nothing by its action herein.

4. The judgment to be entered herein must be in favor of the defendant for the amount of his taxable costs and disbursements.

These conclusions of law signed and dated the —— day of ——, 1921.

On the 9th day of December, 1921, the Court rendered its decision in favor of the plaintiff, by filing in the Clerk's office FINDINGS OF FACT AND CONCLUSIONS OF LAW, as follows:

And now at this time, the Court having duly considered the pleadings, evidence and arguments of counsel, finds the facts in the case to be as follows:

I.

That the plaintiff at all of the times hereinafter mentioned was and still is a corporation organized and existing under the laws of the State of Rhode Island, with its principal place of business in the city of Providence in said State, and is a citizen of said State.

II.

That the defendant at all times herein mentioned was the [474] United States Director General of Railroads, duly appointed and acting under and by virtue of an Act of Congress, and at all times herein mentioned was operating as a common carrier of freight and passengers the railroad lines of the Chicago, Milwaukee & St. Paul Railway Company between the cities of Seattle and Tacoma, Washington, and the city of Chicago, Illinois. That the Chicago, Milwaukee & St. Paul Railway Company at the times herein mentioned was and still is a corporation organized and existing under the laws of the state of Wisconsin, and is a citizen of said state.

III.

That on June 21st and 24th, 1918, the plaintiff caused to be shipped, freight prepaid, from Canton, China, 1000 bales of waste silk, of which 700 bales were consigned to the order of Messrs. Heidelbach,

Ickelheimer & Company of New York, and 300 bales to Goldman, Sachs & Company, New York, all destined to plaintiff, American Silk Spinning Company, at Providence, Rhode Island. That 500 bales were of the quality known as "No. 1 Canton Steam Waste Silk" and 500 bales were of the quality known as "No. 2 Canton Steam Waste Silk."

IV.

That the said 1000 bales of waste silk were delivered at Canton, China, to Osaka Shosen Kaisha, Ltd., and upon delivery to and receipt of said bales in good order and condition, said Osaka Shosen Kaisha, Ltd., on behalf of itself, separately and as a duly authorized agent of the defendant operating lines of railroad, as aforesaid, did jointly execute and deliver four certain through Trans-Pacific and Overland bills of lading covering the transportation of said 1000 bales of waste silk from Canton, China, to Providence, Rhode Island, and consigned and destined as aforesaid. [475]

V.

That by the terms of said bills of lading said waste silk was to be carried by said Osaka Shosen Kaisha, Ltd., from Canton, China, to Seattle, or Tacoma, Washington, on its steamer "Canada Maru" and there delivered to the defendant to be carried by the defendant over the lines of the Chicago, Milwaukee & St. Paul Railway Company and other lines of railroad connecting therewith to the destination named in said bills of lading, to wit,

Providence, Rhode Island, and there delivered to the order of said consignee.

VI.

That said goods were purchased by the plaintiff of the manufacturer in China on four months' letters of credit from date of shipment, issued by the consignee banks, and on August 7, 1918, and prior to the arrival of the goods at Tacoma, the consignee banks without receiving immediate payment of the purchase price, endorsed and delivered the bills of lading to the plaintiff, and plaintiff subsequently paid the drafts which had been guaranteed by letters of credit issued by the consignee banks, when the same became due.

VII.

That said bills of lading were numbered, dated and covered the said 1000 bales of waste silk as follows:

B/L No. 8, dated June 21, 1918, 300 bales
B/L No. 9, dated June 21, 1918, 200 bales
B/L No. 10, dated June 24, 1918, 200 bales
B/L No. 11, dated June 24, 1918, 300 bales

That each of said four bills of lading contained stipulations of the following tenor: "Any carrier or party liable in account of loss of or damage to any part of said property shall have the right of subrogation for the full benefit of any insurance that may have been effected upon or on account of said property."

"Except in the case of negligence in the carrier or party in [476] possession (and the burden to

prove freedom from such negligence shall be on the carrier or party in possession) the carrier or party in possession shall not be liable for loss, damage or delay occurring while the property described herein is stopped and held in transit upon request of the shipper, owner or party entitled to make such request: or resulting from a defect or vice in the property, or from riots or strikes."

That, at the time the bills of lading were issued, freight for the through transportation service was prepaid at the tariff rates as to the railroad service prescribed in tariff previously filed with the Interstate Commerce Commission and then in effect.

VIII.

That on July 30, 1918, and during the time said 1000 bales of waste silk were in course of transportation on said S. S. "Canada Maru" under the said bills of lading, said vessel stranded and large quantities of salt water entered her holds, and as a result 500 bales of waste silk known as "Canton Steam Waste Silk No. 1" and 367 bales of said waste silk known as "Canton Steam Waste Silk No. 2" became wet from the contact with the salt water.

That upon arrival of said S. S. "Canada Maru" at Tacoma, Washington, the said 1000 bales of waste silk were discharged from said vessel. Such discharge was begun early in the morning of August 12, 1918.

IX.

That the 133 bales of waste silk which had not been wet with salt water were in due course trans-

ported by defendant to destination. That the remaining 867 bales which had been wet with salt water were discharged on the dock, which dock belonged to the Chicago, Milwaukee & St. Paul Railway Company, and was then being maintained and operated by defendant as a part of said railway system.

That after the vessel had commenced discharging the wet silk, Mr. Taylor, the representative of the underwriters and owners thereof, called on Mr. Cheney, the Chief Clerk of the Freight Agent at Tacoma, and who was in charge of the dock and the movement [477] of freight therefrom, and told Mr. Cheney that he was very anxious to have quick dispatch of the wet silk, and that it was important that it should go forward in its wet condition. Cheney and Taylor looked at the silk as it was being discharged from the vessel and placed on the dock, and Taylor requested that it be forwarded by silk train service in refrigerator-cars, and Cheney agreed to so forward it, stating that the cost of such service would be $7.50 per hundred pounds as against the bill of lading freight of $1.75 per hundred, and that there would be an additional charge for refrigeration of approximately $21.00 per car to pay, all of which Taylor agreed to.

On August 14th, Taylor again called on Cheney to see how the matter was progressing, and he and Cheney again examined the silk, and Taylor was told by Cheney that the cars had been ordered and would be brought in shortly, and thereafter the cars

were brought in, and approximately one-half of the wet silk bales were loaded on two or more refrigerator-cars for shipment.

X.

That after thus contracting for and accepting all of said 867 bales of wet waste silk for transportation as aforesaid and after loading approximately one-half of said bales in refrigerator-cars as aforesaid, the defendant without the consent of plaintiff and in disregard of plaintiff's protest, failed and refused to transport said bales of wet waste silk, or any part thereof, to destination, and thereafter defendant caused the bales loaded in said refrigerator-cars to be unloaded on said dock, all contrary to the terms and requirements of the aforesaid contract of carriage.

XI.

That at the time said 867 wet bales were accepted for shipment as aforesaid and at all times thereafter, the same were properly packed and in condition for safe transportation by defendant from Tacoma to destination by silk or passenger train service in [478] refrigerator-cars, and such transportation was not prohibited by any regulation of the Interstate Commerce Commission.

XII.

That thereafter defendant demanded that said bales be dried and reconditioned before defendant would transport the same to destination, and plaintiff in order to secure transportation of said bales

to destination was required to and did cause the same to be dried.

That the reasonable cost and expense of drying said bales was $5,000, which sum plaintiff paid therefor.

That plaintiff in taking possession of said 867 bales of wet waste silk for the purpose of drying it as aforesaid did so without relinquishing any of plaintiff's rights in the premises.

That after said 867 bales had been dried as aforesaid, the defendant transported the same without additional freight or charges to destination, to wit: Providence, Rhode Island, and there delivered the same to plaintiff.

XIII.

That the drying of said 867 bales of wet waste silk was done in a reasonable and proper manner.

That the natural and proximate result of the drying of said bales of waste silk was a weakening of the fiber and a discoloration of said waste silk.

That upon arrival of said 867 bales of waste silk at destination, the reasonable, fair market value thereof was the sum of $14,815.67, and no more.

XIV.

That had defendant carried out its contract with plaintiff and transported said 867 bales of wet waste silk to destination by silk or passenger train service in refrigerator-cars, the fair market value of 500 bales of No. 1 waste silk upon delivery at destination would have been $95,394.25, less 10%, and the [479] fair market value of the 367 bales

of No. 2 waste silk upon delivery at destination would have been $40,342.27, less 10%, and the total net value of said 867 bales upon delivery at destination would have been $122,163.32.

XV.

That in addition to the bill of lading freight, the contract between the defendant and plaintiff relating to the transportation of said 867 bales of wet waste silk from Tacoma, Washington, to destination by silk or passenger train service in refrigerator-cars required the plaintiff to pay further freight and charges amounting to $6,724.75.

XVI.

That as a result of the failure and refusal of the defendant to perform its contract to transport said 867 bales of wet waste silk from Tacoma, Washington, to destination by silk or passenger train service in refrigerator-cars, the plaintiff has been damaged in the sum of $105,622.90.

XVII.

That all of said 1000 bales of waste silk were insured against damage in transit from Hong Kong to Providence, Rhode Island, by an open policy issued by the Atlantic Mutual Insurance Company, and on February 6, March 7 and March 12, 1919, the plaintiff received from the Insurance Company $102,052.96 in the aggregate "as a loan pending collection of loss on 868 bales of silk waste ex steamer 'Canada Maru,' refund of the loan to be made to said Atlantic Mutual Insurance Company out of the proceeds of the collection specified."

With respect to shipments such as involved in this action the insurance policy contained a clause as follows:

"It is by the assured expressly stipulated in respect to land carriers that no assignment shall be made to such carriers of claim [480] for loss or contribution of any kind under this policy, nor shall the right of subrogation be abrogated or impaired by or through any agreement intended to relieve such carriers from duties or obligations imposed or recognized by the common law or otherwise."

As CONCLUSION OF LAW the Court finds:

1. That plaintiff is the real party in interest and entitled to maintain this suit.

2. That the contract between Cheney and Taylor for the movement of the goods from Tacoma by silk train in refrigerator-cars was valid and binding on the defendant and no good sufficient reason is shown for defendant's refusal to comply therewith.

3. That plaintiff is entitled to have and recover from defendant damages in the sum of $105,622.90 with costs and disbursements properly taxed in this action, and that a judgment in favor of the plaintiff and against the defendant shall be entered accordingly.

To each of the foregoing facts and conclusions of law defendant excepts and such exceptions are hereby allowed.

December 7, 1921.

R. S. BEAN,
Judge.

And on the 13th day of December, 1921, the defendant presented, and the Court allowed and certified, a BILL OF EXCEPTIONS to the findings of the Court and to the refusal of the Court to make the findings which defendant requested, which bill of exceptions is as follows: [481]

The defendant, claiming error in the Court's decision contained in the Findings of Fact and Conclusions of Law filed herein, takes exception thereto, as follows:

I.

Referring to the finding in paragraph numbered III the defendant excepts to that portion thereof in the following words:

> "That 500 bales were of the quality known as 'No. 1 Canton Steam Waste Silk' and 500 bales were of the quality known as 'No. 2 Canton Steam Waste Silk.' "

For the reason that there is no evidence indicating how many of the bales of Canton Waste Silk were of the quality known as No. 1, or the number of bales of the quality indicated as No. 2.

II.

Referring to the finding of fact contained in paragraph thereof numbered VIII, the defendant excepts to that part thereof in the following words:

> "That on July 30, 1918, and during the time said 1000 bales of waste silk were in course of transportation on said S. S. 'Canada Maru' under the said bills of lading, said vessel stranded and large quantities of salt water en-

tered her holds, and as a result 500 bales of waste silk known as 'Canton Steam Waste Silk No. 1' and 367 bales of said waste silk known as 'Canton Steam Waste Silk No. 2' became wet from the contact with the salt water'';

For the reason that there is no evidence upon which the Court could find that 500 of the bales that were wet with salt water were of the quality known as Canton Steam Waste Silk No. 1, nor from which the Court could find that 367 of the wet bales were of the quality known as Canton Steam Waste Silk No. 2.

III.

Referring to the finding of fact contained in the paragraph thereof numbered IX, the defendant excepts to that portion thereof in the following words:

''That after the vessel had commenced discharging the wet silk, Mr. Taylor, the representative of the underwriters and owners thereof, called on Mr. Cheney, the Chief Clerk of the Freight Agent at Tacoma, and who was in charge of the dock and the movement of freight therefrom, and told Mr. Cheney that he [482] was very anxious to have quick dispatch of the wet silk, and that it was important that it should go forward in its wet condition. Cheney and Taylor looked at the silk as it was being discharged from the vessel and placed on the dock, and Taylor requested that it be forwarded by silk train service in refrigerator-

cars, and Cheney agreed to so forward it, stating that the cost of such service would be $7.50 per hundred pounds as against the bill of lading freight of $1.75 per hundred, and that there would be an additional charge for refrigeration of approximately $21.00 per car to pay, all of which Taylor agreed to.

On August 14th, Taylor again called on Cheney to see how the matter was progressing, and he and Cheney again examined the silk, and Taylor was told by Cheney that the cars had been ordered and would be brought in shortly, and thereafter the cars were brought in, and approximately one-half of the wet silk bales were loaded on two or more refrigerator-cars for shipment."

For the reason that there is no evidence upon which the Court could find that Cheney was in charge of the dock or the movement of freight therefrom, or that Cheney had any authority to make or enter into any agreement respecting the transportation of freight, and for the further reason that the uncontradicted evidence in the case and all the evidence bearing on that point proves affirmatively that Cheney did not have any authority whatever to make or enter into any agreement respecting the transportation of freight; and for the further reason that by the Interstate Commerce Law railway carriers are strictly prohibited from entering into special contracts for special service at special rates for transportation of freight; and for the further reason that Taylor did not in fact

pay, or tender to pay, or make any promise binding upon the plaintiff to pay extra charges for the service required for transportation of 867 bales by a silk train, or the extra charge for transportation of said bales in refrigerator-cars; and for the further reason that said finding does not include the requirement demanded by Taylor for sprinkling or drenching said wet bales so as to keep them continuously wet during the time of transit to destination.

IV.

Defendant excepts to all of said findings included in paragraph [483] thereof numbered X, for the reason that there is no evidence on which the Court could find that there was any contract for transportation of 867 bales in their wet condition, nor on which the Court could find that the unloading of the refrigerator-cars was contrary to the terms and requirements of any contract.

V.

Defendant excepts to all of said findings contained in paragraph thereof numbered XI, for the reason that there is no evidence on which the Court could find that said wet bales were in a condition fit for safe transportation, and for the further reason that the evidence proves affirmatively that the wetting of said 867 bales generated heat and caused diffusion of offensive fumes so that the same were difficult to handle, liable to cause spontaneous combustion and fire while confined in freight-cars, and were totally unfit for transportation without being reconditioned; and for the further reason that the

Court's finding that transportation of said bales while in a wet condition was not prohibited by any regulation of the Interstate Commerce Commission is immaterial.

VI.

Defendant excepts to that part of the findings contained in paragraph thereof numbered XII in the following words:

> "That the reasonable cost and expense of drying said bales was $5,000, which sum plaintiff paid therefor."

For the reason that there is no evidence on which the Court could find that the plaintiff paid the cost of drying and reconditioning said 867 bales; but, on the contrary, the uncontradicted evidence proves that the $5,000 was paid by Taylor, the underwriter's agent, in that behalf.

VII.

Defendant excepts to that part of the findings contained in paragraph numbered XII, in the following words: [484]

> "That plaintiff in taking possession of said 867 bales of wet waste silk for the purpose of drying it as aforesaid did so without relinquishing any of plaintiff's rights in the premises."

For the reason that there is no evidence upon which the Court could find that the plaintiff or Taylor made any reservation of rights in connection with the drying and reconditioning of said 867 bales under Taylor's direction.

VIII.

Defendant excepts to that part of the findings contained in paragraph thereof numbered XIII, in the following words:

> "That the natural and proximate result of the drying of said bales of waste silk was a weakening of the fiber and a discoloration of said waste silk."

For the reason that there is no evidence on which the Court could find that the drying of said bales weakened the fiber or caused a discoloration of said waste silk, but, on the contrary, the plaintiff's complaint alleges the effect of the drying to have been a damage only by discoloration, and the uncontradicted evidence proves that the weakening of the fiber of the silk and discoloration thereof was caused by the wetting of said bales and not by the drying.

IX.

Defendant excepts to that part of the findings contained in paragraph thereof numbered XIII, in the following words:

> "That upon arrival of said 867 bales of waste silk at destination, the reasonable, fair market value thereof was the sum of $14,815.67, and no more."

For the reason that there is no evidence on which the Court could find that the reasonable, fair market value of said 867 bales at the time of delivery thereof at destination was not in excess of the sum of $14,815.67.

X.

Defendant excepts to all of said findings contained in paragraph thereof numbered XIV, for the reason and on the ground [485] that there is no evidence on which the Court could find that of said 867 bales 500 bales were of the quality or grade known as No. 1, or find that the market value of the bales of No. 1 was $95,394.25, less 10%; or that the market value of the No. 2 was $40,342.27, less 10%; or that the total net value of said 867 bales was $122,163.32. On the contrary, the only evidence as to quantities and value of 867 bales of the respective grades No. 1 and No. 2 is contained in the deposition of plaintiff's witness Edward W. Lownes, in which he stated the quantity of the No. 1 grade to have been 46,613 pounds and that the total net value of said 867 bales was $113,088.40.

XI.

Defendant excepts to all of the findings contained in paragraph thereof numbered XV, for the reason that there is no evidence on which the Court could find that the amount payable by the plaintiff for the extra services required in transportation of said 867 bales to destination in their wet condition amounted to $6,724.75, and for the reason and on the ground that there was no contract fixing the amount payable for such extra service and the uncontradicted evidence proves that the tariffs on file with the Interstate Commerce Commission and the bill of lading contracts under which the transportation service was undertaken are alike silent as to any rate payable for such or similar extra service,

and the amount of extra charges could not be provided for by special agreement.

XII.

Defendant excepts to all of the findings contained in paragraph thereof numbered XVI for the reason that there is no evidence on which the Court could find the amount of plaintiff's damages to be $105,622.90, or any sum whatever, nor on which the Court could find any damages whatever caused by any act, omission or failure on the part of the defendant to fully perform the contract undertaken and covered by the bills of lading. [486]

XIII.

Defendant excepts to so much of the findings contained in paragraph numbered XVII as amounts to a decision that all or any of the money paid to the plaintiff by the Atlantic Mutual Insurance Company was a loan, for the reason that the payments were in discharge of the Insurance Company's obligation as an insurer and without any obligation on the part of the plaintiff to ever repay any part of the money so received.

XIV.

Defendant excepts to paragraph numbered 1 of the Court's conclusions of law, for the reason that by the uncontradicted evidence it is proved that the plaintiff is not the real party in interest, but commenced and maintained this action for the sole benefit of the Atlantic Mutual Insurance Company; and by the uncontradicted evidence it is proved that the plaintiff was not the owner of the 867 bales at the time the same were damaged.

XV.

Defendant excepts to paragraph numbered 2 of the Court's conclusions of law, for the reason that there was no contract between Cheney and Taylor for the movement of the 867 bales; for the further reason that Cheney was not an authorized agent to make any contract binding on the defendant with respect to the transportation of freight; and for the further reason that such a contract, if it had been formally made, would be unenforceable because expressly forbidden by the provisions of the Interstate Commerce Law.

XVI.

Defendant excepts to the third paragraph of the Court's conclusions of law for the reason that the same is contrary to the facts of the case and contrary to law. [487]

XVII.

The defendant requested the Court to find and include in its findings of fact the following:

> "On the 30th day of July, 1918, the 'Canada Maru,' with said 1000 bales on board, met with a maritime disaster by striking on rocks and stranding on the coast of Washington near Cape Flattery, and said vessel was thereby so badly damaged that her hold and cargo space were filled with sea water and eight hundred and sixty-seven (867) of said bales were completely submerged in the hold of said vessel."

And to the refusal of the Court to make and certify said finding the defendant excepts.

XVIII.

The defendant requested the Court to find and include in its findings of fact the following:

> "Said vessel was rescued from her perilous position and towed to Tacoma, where she arrived on the 10th day of August, 1918, and from thence proceeded to a drydock for necessary temporary repairs before commencing to discharge cargo. After returning to Tacoma she commenced discharging said bales of silk on the 12th day of August and completed discharging said bales on the 16th day of Augst, 1918."

And to the refusal of the Court to make and certify said finding the defendant excepts.

XIX.

The defendant requested the Court to find and include in its findings of fact the following:

> "When discharged from said vessel, one hundred thirty-three (133) of said bales were found to be undamaged and the same were promptly transported to destination. The other 867 bales were completely saturated with sea water, whereby heat and malodorous fumes emanated therefrom to such an extent that the stevedores were able only with great difficulty to remove the same from the hold of said vessel, and, after being unloaded on the dock, heating and diffusion of malodorous fumes continued, to such an extent that, after inspection by a Cargo Surveyor, said 867 bales were, by agents of the Chicago, Milwaukee & St. Paul Railway Company and said Cargo Surveyor,

deemed to be dangerous to handle, dangerous to carry by railway from Tacoma to Providence, and unfit for transportation without being reconditioned."

And to the refusal of the Court to make and certify such finding the defendant excepts. [488]

XX.

The defendant requested the Court to find and include in its findings of fact the following:

"All of said 1000 bales were insured against damage in transit from Hong Kong to Providence by the Atlantic Mutual Insurance Company; and during the time of the unloading of the said bales from said vessel, Frank G. Taylor, representing the Underwriters, by direction of the Atlantic Mutual Insurance Company, visited the premises where said wet bales were, for the time being, situated, and became informed as to the condition thereof, and, after being definitely informed by agents of the Chicago, Milwaukee & St. Paul Railway Company that the same were deemed to be unfit for transportation and that said Railway Company would not assume the risk of transporting the same from Tacoma in their wet condition, caused said wet bales to be removed from Tacoma to Seattle for the purpose of being reconditioned by drying the same, and entered into a contract with the Pacific Oil Mills, at Seattle, to perform the service of drying and re-baling the contents of said bales after being dried and re-delivering the same, which con-

tract was performed by said Pacific Oil Mills, and for said service said Taylor paid Five Thousand ($5,000) Dollars.

And to the refusal of the Court to make and certify such finding the defendant excepts.

XXI.

The defendant requested the Court to find and include in its findings of facts the following:

"That the time consumed in completing said operation of drying extended until the 20th day of January, 1919."

And to the refusal of the Court to make and certify said finding the defendant excepts.

XXII.

The defendant requested the Court to find and include in its findings of facts the following:

"That, after being reconditioned as aforesaid, all of the contents of said 867 bales were, by the Chicago, Milwaukee & St. Paul Railway and connecting lines, transported from Seattle to, and delivered at, Providence, Rhode Island, that service being completed on the 30th day of January, 1919."

And to the refusal of the Court to make and certify said finding the defendant excepts.

XXIII.

The defendant requested the Court to find and include in its [489] findings of fact the following:

"On the security of letters of credit all of said 1000 bales were sold by the manufacturers in China on a credit of four (4) months from

the date of shipment thereof from China; the consignees aforesaid, without receiving immediate payment of the purchase price for said merchandise, at the time of delivering said bills of lading to the plaintiff, took from said plaintiff a trust receipt, in effect stipulating that said merchandise belonged to said consignees until the purchase price aforesaid should be paid, which payment was made at the time of, and not before, the expiration of said four months' period of credit, which was on or about October 24th, 1918, and at that time, by said payment, the plaintiff acquired ownership of said merchandise."

And to the refusal of the Court to make and certify said finding the defendant excepts.

XXIV.

The defendant requested the Court to find and include in its findings of facts the following:

"In whatever way said merchandise became damaged or diminished in value, subsequent to the unloading thereof from the 'Canada Maru,' such damage or impairment of value occurred and was fully consummated during the time intervening between the 12th day of August and the 24th day of October, 1918, during which time the consignees, Heidelbach Ickelheimer & Co. and Goldman Sachs & Co., named respectively in said bills of lading, were owners of said merchandise."

And to the refusal of the Court to make and certify said finding the defendant excepts.

XXV.

The defendant requested the Court to find and include in its findings of facts the following:

"The market value of the silk waste contained in said 867 bales, on arrival at Providence in the due and ordinary course of transportation, if then undamaged, would have been $125,653.78; that gross sum being arrived at by computation of the market value of two grades of silk waste, No. 1 grade being at the rate of $1.51 per pound, of which there was 46,613 pounds, and No. 2 grade at .87 per pound, and there is a total failure on the part of plaintiff to introduce any evidence respecting the weight of the silk of said No. 2 grade; and there is a total failure on the part of plaintiff to prove the difference in market value between the sound value—viz., $125,653.78—and the market value of said merchandise at the time of its delivery at Providence in the state it was after being reconditioned as aforesaid."

And to the refusal of the Court to make and certify said finding [490] the defendant excepts.

XXVI.

The defendant requested the Court to find and include in its findings of facts the following:

"That in the months of February and March, 1919, the Atlantic Mutual Insurance Company paid the plaintiff sums of money aggregating Seventy-seven Thousand Seven Hundred Fifty-two and 96/100 Dollars, and there is a total failure on the part of plaintiff to prove that

any damage by deterioration of said merchandise, or expenses chargeable as a loss incidental to the transportation thereof, amounts to any sum in excess of said $77,752.96, paid by said Insurance Company as aforesaid, whereby the plaintiff, previous to the commencement of this action, received full compensation for whatever loss or damage it may have sustained in connection with the transportation of said merchandise."

And to the refusal of the Court to make and certify said finding the defendant excepts.

XXVII.

The defendant requested the Court to find and include in its findings of facts the following:

"The defendant did not make, or enter into, any agreement for transportation of said 867 bales while in the wet condition in which they were discharged from the 'Canada Maru,' or any agreement whatsoever respecting the transportation of said merchandise other than, or different from, the written contract contained in said four bills of lading, nor at any time accept said 867 bales, or any part thereof, for transportation without being reconditioned."

And to the Court's refusal to make and certify said finding the defendant excepts.

XXVIII.

The defendant requested the Court to find and include in its findings of facts the following:

"The defendant did not, by any act or omission, cause, or contribute to the cause of, any

damage whatever or impairment of value of said merchandise, or any part therof, or in any manner fail to fully and completely perform his contract for that part of the transportation by his Railroad."

And to the refusal of the Court to make and certify said finding the defendant excepts. [491]

XXIX.

The defendant requested the Court to state as a conclusion of law as follows:

"The plaintiff herein is not the real party in interest nor entitled by law to maintain this action."

And to the refusal of the Court to make and certify such conclusion the defendant excepts.

XXX.

The defendant requested the Court to state as a conclusion of law as follows:

"The defendant is not, by any act or omission, guilty of any breach whatever of the contract sued on herein."

And to the refusal of the Court to make and certify such conclusion the defendant excepts.

XXXI.

The defendant requested the Court to state as a conclusion of law as follows:

"The defendant is entitled to have a judgment in his favor that the plaintiff take nothing by its action herein."

And to the refusal of the Court to make and certify such conclusion the defendant excepts.

XXXII.

The defendant requested the Court to state as a conclusion of law as follows:

"The judgment to be entered herein must be in favor of the defendant for the amount of his taxable costs and disbursements."

And to the refusal of the Court to make and certify such conclusion the defendant excepts.

GEO. W. KORTE,
C. H. HANFORD,
Attorneys for Defendant.

BE IT REMEMBERED, that on this 13th day of December, 1921, the defendant presented and submitted the foregoing bill of exceptions [492] and the same and each of the exceptions therein noted is by the Court allowed.

R. S. BEAN,
Judge.

Which bill of exceptions was filed on the 14th day of December, 1921.

On the 13th day of December, 1921, the Court made and signed the following order, extending the time for preparing and submitting the defendant's general bill of exceptions for use in prosecuting a writ of error:

ORDER EXTENDING TIME.

On reading and filing the above motion, it is, by the Court, ORDERED, that the time for preparing and submitting the defendant's general bill of exceptions, for use in prosecuting a writ of error from the Circuit Court of Appeals for the Ninth Cir-

cuit, be, and the same is hereby, extended for a period of sixty (60) days from this 13th day of December, 1921.

R. S. BEAN,
Judge.

On the 14th day of December, 1921, the parties, by their Attorneys, signed the following STIPULATION:

"IT IS STIPULATED by and between the Attorneys for the respective parties, that the defendant shall have, and is hereby granted, a period of sixty (60) days from and after the entry of judgment herein, within which to prepare, serve and file his general bill of exceptions for use in prosecuting a writ of error from the Circuit Court of Appeals for the Ninth Circuit.

Dated this 14th day of December, 1921.

BALLINGER, BATTLE, HULBERT & SHORTS,
J. M. RICHARDSON LYETH,
Attorneys for Plaintiff.
GEO. W. KORTE,
C. H. HANFORD,
Attorneys for Defendant. [493]

The judgment in favor of the plaintiff was signed by the presiding Judge on the 15th day of December, 1921, and filed in the Clerk's office on December 16th, 1921, and to the granting of said judgment in favor of the plaintiff the defendant excepted and his exception was allowed by the Court.

Now, in furtherance of justice and that right

may be done, the defendant presents the foregoing as his bill of exceptions in this cause, and prays that the same may be settled, allowed, signed and certified by the Presiding Judge, as provided by law, and filed as a bill of exceptions and made a part of the record in this cause.

GEO. W. KORTE,
C. H. HANFORD,
Attorneys for Defendant. [494]

Certificate of Judge Settling Bill of Exceptions.

And now, on this 8th day of February, 1922, the foregoing bill of exceptions was presented for allowance and approval of the Court.

And it appearing to the Court that said bill of exceptions was duly served upon the attorneys for the plaintiff on the 16th day of January, 1922, and that no amendments have been proposed or objections made thereto, and that the same contains a full, true and complete report of the proceedings on the trial of this cause,—

THEREFORE, I, ROBERT S. BEAN, United States District Judge for the District of Oregon, having been duly assigned to hold a term of court for the Western District of Washington, at Seattle, and having presided in the said court on the trial of said cause, and to whom said cause was submitted for decision, and by whom the judgment in said cause was rendered, do hereby

ORDER AND CERTIFY, that said bill of exceptions be, and the same is, allowed to be filed and made a part of the record of said cause; and I

certify that said bill of exceptions is true and that, together with the exhibits referred to therein, it contains all of the evidence introduced on the trial of said cause by the respective parties and a full, true and complete report of the proceedings on said trial, including exceptions taken to rulings of the Court and to the findings of fact and conclusions of law and to the refusal of the Court to make findings requested by the defendant in due time and *fuly* allowed by the Court.

And it is FURTHER ORDERED by the Court that the original exhibits referred to in said bill of exceptions are hereby made a part thereof, and the Court directs that the originals of said exhibits be transmitted to the Circuit Court of Appeals, together [495] with the transcript of the record in said cause, including this bill of exceptions.

R. S. BEAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Feb. 8, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [496]

United States District Court, Western District of Washington, Southern Division.

No. 2905.

AMERICAN SILK SPINNING COMPANY,
Plaintiff,

vs.

DIRECTOR GENERAL OF RAILROADS (Operating Chicago, Milwaukee & St. Paul Railway),
Defendant.

Acknowledgment of Service of Bill of Exceptions.

WE, THE UNDERSIGNED, attorneys of record for the plaintiff in the above-entitled action, do hereby acknowledge that, on the 16th day of January, 1922, there was served upon us a true copy of the defendant's proposed general bill of exceptions for use on writ of error from the Circuit Court of Appeals for the Ninth Circuit.

BALLINGER, BATTLE, HULBERT & SHORTS,
J. M. RICHARDSON LYETH,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Feb. 8, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [497]

United States District Court, Western District of Washington, Southern Division.

No. 2905.

AMERICAN SILK SPINNING COMPANY, a Corporation,

Plaintiff,

vs.

THE DIRECTOR GENERAL OF RAILROADS (Operating the Chicago, Milwaukee & St. Paul Railway),

Defendant.

Assignments of Error.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

This cause having proceeded to final judgment in favor of the plaintiff, and the defendant desiring to prosecute a writ of error, for the purpose of specifying the particular errors relied upon for reversal of the said judgment, makes the following assignment of errors:

ASSIGNMENT OF ERROR No. 1.

The Court erred in admitting and considering the following irrelevant and incompetent testimony: In the deposition of Arthur D. Little, page 109 of the defendant's bill of exceptions, the following question was propounded by counsel for the plaintiff:

"To a person having experience in handling commodities and cargoes ordinarily shipped on

railroads in the United States, is there any reasonable justification for assuming that because a cargo of Canton silk waste which has been wet with sea water is heating to a certain degree and giving off ammonia—in assuming that the cargo is dangerous or liable to spontaneous combustion if transported,"

And to that question the counsel for the defendant objected, on the ground that it called for an opinion as to the ultimate facts to be passed upon by the Court, and did not call for an opinion upon a matter provable by the testimony of an expert witness, and on the further ground that the witness is not qualified to testify as an expert in answer to that question, [498] to which question the witness made the following answer:

"In my opinion, there is none, both for the reason that silk waste is well known not to be subject to spontaneous combustion, and for the further fact that the ammonia evolved is in itself an efficient fire extinguisher."

And the defendant excepted to the ruling of the Court, admitting said answer in evidence, and his exception was allowed.

And in the same deposition the following question was propounded by counsel for the plaintiff:

"I show you pamphlet entitled: 'INTERSTATE COMMERCE COMMISSION. REGULATIONS FOR THE TRANSPORTATION OF EXPLOSIVES AND OTHER DANGEROUS ARTICLES BY FREIGHT.' dated September, 1918, page 49 thereof, article

1801, regarding 'Forbidden Articles.' Subsection (d) reading as follows:

> 'Rags or cotton waste oily with more than 5 per cent of vegetable or animal oil, or wet rags, or wet textile waste, or wet paper stock,' and ask you whether Canton steam waste could properly or reasonably be classified under any of these words?"

And to that question the defendant objected, and, notwithstanding his objection, the witness was permitted to answer.

And to that question the witness made the following answer:

> "It is certainly not to be classified as rags or cotton waste oily with more than five per cent of vegetable or animal oil, since the Canton steam silk waste contains practically no oil and has moreover not been processed in any such sense as rags or cotton waste. Neither can it be classified as wet rags or wet paper stock, nor as wet textile waste for the reason in the latter case that it bears the same relation to cotton or other textile waste that raw or cotton linters bear to the waste of the textile mill. It is, in fact, although called a waste, a valuable and well recognized raw material for an important manufacture."

And to the admission of said testimony the defendant excepted, and his exception was allowed by the Court. [499]

And in the same deposition the following question was propounded by counsel for the plaintiff:

"Whether or not a freight claim agent of such a road ought to have known the commodity known as Canton steam silk waste with its relation to the possible danger of spontaneous combustion?"

And to that question the defendant excepted for the reason that it calls for an opinion upon a man's mentality; but, notwithstanding said objection, the witness was permitted to answer.

To the above question the witness made the following answer:

"Canton steam silk waste is a commodity of such well known character and frequent shipment and commercial value that those engaged in its transportation, and particularly the freight agents of transcontinental railroads, by which such material is commonly transported, might, it seems to me, in my opinion, be properly assumed to possess the general knowledge of its properties and characteristics as regards any tendency to spontaneous combustion. In other words, they should know that it is commonly recognized that it has no such tendency."

And to the admission of that testimony the defendant excepted and his exception was allowed by the Court.

And in the deposition of Edward A. Barrier, defendant's bill of exceptions, Page 123, the following question was propounded to said witness by counsel for the plaintiff:

"Assume the facts that I have stated in my

hypothetical question up to the time that the bales of silk were unloaded on the wharf, and assume that they were wet down with a hose and that approximately one-half of the cargo had been loaded in refrigerator-cars, and that the assistant freight claim agent of the defendant railroad, the Chicago, Milwaukee & St. Paul, had at that time directed that the silk be unloaded from the refrigerator-cars and that it be not shipped unless it was first frozen or dried,—whether or not such claim agent would have been reasonably justified in assuming that the wet silk waste was a dangerous commodity to be transported and liable to spontaneous combustion?"

And to that question the defendant excepted, on the ground that it calls for the conclusion of the witness upon the ultimate facts and relates to an opinion in relation to the facts which do not involve technical knowledge or the knowledge of an expert, and, therefore, the witness is incompetent to testify as to such matters. But, notwithstanding said objection, the witness was permitted to answer as follows:

"I do not consider that the freight agent would be justified in taking that action. I might say that my reason for that is this: That I believe that a man whose [500] duties are to pass on such important questions as that should be familiar at least with the general properties of the materials with which he is dealing, and the properties of raw silk with reference to the

possibility of the spontaneous ignition, such as are generally known among those that are qualified to give information on the subject, can be easily obtained."

And to that answer the defendant excepted and his exception was allowed by the Court.

And the following question was propounded to the same witness by counsel for the plaintiff:

"Is the fact that a commodity of animal or vegetable origin heats from fermentation, alone reasonable ground for assuming that it is a dangerous commodity to transport or that it is liable to spontaneous combustion?"

And to that question the defendant objected, on the ground that it called for an opinion on the ultimate facts and not an opinion relating to anything which calls for technical knowledge. Notwithstanding said objection the witness was permitted to answer.

To the above question the witness made the following answer:

"I should say not. The railroads are regularly transporting material which is subject to heating which does not ignite spontaneously."

And to the admission of that testimony the defendant excepted, and his exception was allowed by the Court.

And in the deposition of Harry Albert Mereness, defendant's bill of exceptions, page 200, the following question was propounded to said witness by counsel for the plaintiff:

"Assume further that when the silk waste had first been discharged from the vessel, it had heated to some extent and that it had been wet down by hose, and that on August 15th and 16th the heating had reduced and that in some bales it had disappeared entirely; that ammonia fumes were coming off,—whether or not, under those conditions, there would have been reasonable ground for assuming that there was any danger from spontaneous combustion in transporting the cargo in refrigerator-cars iced across the continent?"

And to that question the defendant objected, on the ground that the question is incompetent, immaterial and irrelevant, and the witness is not competent to give his opinion on the subject, and it calls for an opinion on a subject which an expert is incompetent to give, and it is the conclusion of a given state of facts which the jury or the Court must pass upon. But, notwithstanding said objection, the witness was permitted to answer the question. [501]

To the foregoing question said witness made the following answer:

"Under the conditions that you have outlined, I have no reason to believe that there would be any danger due to spontaneous combustion in shipping this cargo."

And to that testimony the defendant excepted, and his exception was allowed by the Court.

ASSIGNMENT OF ERROR No. II.

At the conclusion of the trial and after the argu-

ment by counsel for the plaintiff and defendant respectively, the cause was taken under advisement by the Court, and, in due time, before the rendition of the Court's decision, the defendant submitted in writing proposed findings of fact and conclusions of law, and requested the Court to make findings and conclusions accordingly, including the following:

> "On the 30th day of July, 1918, the 'Canada Maru,' with said 1000 bales on board, met with a maritime disaster by striking on rocks and stranding on the coast of Washington near Cape Flattery, and said vessel was thereby so badly damaged that her hold and cargo space were filled with sea water and eight hundred and sixty-seven (867) of said bales were completely submerged in the hold of said vessel."

And to make said findings, the Court refused, and to the ruling of the Court in refusing to make said findings, the defendant at the time excepted, and said exception was allowed by the Court.

ASSIGNMENT OF ERROR No. III.

Defendant also requested the Court to make a finding as follows:

> "Said vessel was rescued from her perilous position and towed to Tacoma, where she arrived on the 10th day of August, 1918, and from thence proceeded to a drydock for necessary temporary repairs before commencing to discharge cargo. After returning to Tacoma she commenced discharging said bales of silk

on the 12th day of August and completed discharging said bales on the 16th day of August, 1918." [502]

And to make said finding the Court refused, and to the ruling of the Court in refusing to make said finding the defendant excepted, and his exception was allowed by the Court.

ASSIGNMENT OF ERROR No. IV.

And defendant also requested the Court to make a finding as follows:

"When discharged from said vessel, one hundred thirty-three (133) of said bales were found to be undamaged and the same were promptly transported to destination. The other 867 bales were completely saturated with sea water, whereby heat and malodorous fumes emanated therefrom to such an extent that stevedores were able only with great difficulty to remove the same from the hold of said vessel, and, after being unloaded on the dock, heating and diffusion of malodorous fumes continued, to such an extent that, after inspection by a Cargo Surveyor, said 867 bales were, by agents of the Chicago, Milwaukee & St. Paul Railway Company and said Cargo Surveyor, deemed to be dangerous to handle, dangerous to carry by railway from Tacoma to Providence, and unfit for transportation without being reconditioned."

And to make said finding the Court refused and to the ruling of the Court in refusing to make said

finding the defendant excepted, and said exception was allowed by the Court.

ASSIGNMENT OF ERROR No. V.

And the defendant also requested the Court to make a finding as follows:

> "All of said 1000 bales were insured against damage in transit from Hong Kong to Providence by the Atlantic Mutual Insurance Company; and during the time of the unloading of the said bales from said vessel, Frank G. Taylor, representing the Underwriters, by direction of the Atlantic Mutual Insurance Company, visited the premises where said wet bales were, for the time being, situated, and became informed as to the condition thereof, and, after being definitely informed by the Agents of the Chicago, Milwaukee & St. Paul Railway Company that the same were deemed to be unfit for transportation and that said Railway Company would not assume the risk of transporting the same from Tacoma in their wet condition, caused said wet bales to be removed from Tacoma to Seattle for the purpose of being reconditioned by drying the same, and entered into a contract with the Pacific Oil Mills, at Seattle, to perform the service of drying and rebaling the contents of said bales after [503] being dried and redelivering the same, which contract was performed by said Pacific Oil Mills, and for said service said Taylor paid Five Thousand ($5,000.00) Dollars."

And to make said finding, the Court refused, and

to the ruling of the Court in refusing to make said finding the defendant excepted, and said exception was allowed by the Court.

ASSIGNMENT OF ERROR No. VI.

And defendant also requested the Court to make a finding as follows:

> "That the time consumed in completing said operation or drying extended until the 20th day of January, 1919."

To make said finding, the Court refused, and to the ruling of the Court in refusing to make said finding the defendant excepted, and said exception was allowed by the Court.

ASSIGNMENT OF ERROR No. VII.

The defendant requested the Court to find and include in its findings of fact the following:

> "That, after being reconditioned as aforesaid, all of the contents of said 867 bales were, by the Chicago, Milwaukee & St. Paul Railway and connecting lines, transported from Seattle to, and delivered at, Providence, Rhode Island, that service being completed on the 30th day of January, 1919."

To make said finding, the Court refused, and to the ruling of the Court in refusing to make said finding the defendant excepted, and said exception was allowed by the Court.

ASSIGNMENT OF ERROR No. VIII.

The defendant also requested the Court to make a finding as follows:

> "On the security of letters of credit all of said 1000 bales were sold by the manufacturers

in China on a credit of four (4) months from the date of shipment thereof from China; the consignees aforesaid, without receiving immediate payment of the purchase price for said merchandise, at the time of delivering said bills of lading to the plaintiff, took from said plaintiff a trust receipt, in effect stipulating that said merchandise belonged [504] to said consignees until the purchase price aforesaid should be paid, which payment was made at the time of, and not before, the expiration of said four months period of credit, which was on or about October 24th, 1918, and at that time, by said payment, the plaintiff acquired ownership of said merchandise."

To make said finding, the Court refused, and to the ruling of the Court in refusing to make said finding, the defendant excepted, and said exception was allowed by the Court.

ASSIGNMENT OF ERROR No. IX.

The defendant also requested the Court to make a finding as follows:

"In whatever way said merchandise became damaged or diminished in value, subsequent to the unloading thereof from the "Canada Maru," such damage or impairment of value occurred and was fully consummated during the time intervening between the 12th day of August and the 24th day of October, 1918, during which time the consignees, Heidelbach Ickelhiemer & Co. and Goldman Sachs & Co., named respectively in said bills of lading, were owners of said merchandise."

To make said finding, the Court refused, and to the ruling of the Court in refusing to make said finding, the defendant excepted, and said exception was allowed by the Court.

ASSIGNMENT OF ERROR No. X.

The defendant also requested the Court to make a finding as follows:

> "The market value of the silk waste contained in said 867 bales, on arrival at Providence in the due and ordinary course of transportation, if then undamaged, would have been $125,653.78; that gross sum being arrived at by computation of the market value of two grades of silk waste, No. 1 grade being at the rate of $1.51 per pound, of which there was 46,613 pounds, and No. 2 grade at .87 per pound, and there is a total failure on the part of plaintiff to introduce any evidence respecting the weight of the silk of said No. 2 grade; and there is a total failure on the part of the plaintiff to prove the difference in market value between the sound value—viz; $125,653.78—and the market value of said merchandise at the time of its delivery at Providence in the state it was after being reconditioned as aforesaid." [505]

The Court refused to make said finding, and to the ruling of the Court in refusing to make said finding, the defendant excepted, and said exception was allowed by the Court.

ASSIGNMENT OF ERROR No. XI.

And the defendant also requested the Court to make a finding as follows:

"That in the months of February and March, 1919, The Atlantic Mutual Insurance Company paid the plaintiff sums of money aggregating Seventy-seven Thousand Seven Hundred Fifty-two and 96/100 Dollars, and there is a total failure on the part of plaintiff to prove that any damage by deterioration of said merchandise, or expenses chargeable as a loss incidental to the transportation thereof, amounts to any sum in excess of said $77,752.96, paid by said Insurance Company as aforesaid, whereby the plaintiff, previous to the commencement of this action, received full compensation for whatever loss or damage it may have sustained in connection with the transportation of said merchandise."

The Court refused to make said finding, and to the ruling of the Court in refusing to make said finding, the defendant excepted, and said exception was allowed by the Court.

ASSIGNMENT OF ERROR No. XII.

And the defendant requested the Court to make a finding as follows:

"The defendant did not make, or enter into, any agreement for transportation of said 867 bales while in the wet condition in which they were discharged from the 'Canada Maru,' or any agreement whatsoever respecting the transportation of said merchandise other than, or different from, the written contract contained in said four bills of lading, nor at any time

accept said 867 bales, or any part thereof, for transportation without being reconditioned."

To make said finding, the Court refused, and to the ruling of the Court in refusing to make said finding, the defendant excepted, and said exception was allowed by the Court.

ASSIGNMENT OF ERROR No. XIII.

The defendant also requested the Court to make a finding [506] as follows:

"The defendant did not, by any act or omission, cause, or contribute to the cause of, any damage whatever or impairment of value of said merchandise, or any part thereof, or in any manner fail to fully and completely perform his contract for that part of the transportation by his Railroad."

The Court refused to make said finding, and to the ruling of the Court in refusing to make said finding, the defendant excepted, and said exception was allowed by the Court.

ASSIGNMENT OF ERROR No. XIV.

The defendant requested the Court to include in its conclusions of law the following:

"The plaintiff herein is not the real party in interest nor entitled by law to maintain this action,"

which request was refused by the Court, and to the ruling of the Court in refusing to make said finding the defendant excepted, and said exception was allowed by the Court.

ASSIGNMENT OF ERROR No. XV.

The defendant requested the Court to make as a conclusion of law the following:

> "The defendant is not, by any act or omission, guilty of any breach whatever of the contract sued on herein,"

which request was refused by the Court, and to said refusal the defendant excepted, and said exception was allowed by the Court.

ASSIGNMENT OF ERROR No. XVI.

And the defendant requested the Court to make as a conclusion of law the following:

> "The defendant is entitled to have a judgment in his favor that the plaintiff take nothing by its action herein."

The above request was refused by the Court, and to the ruling of the Court in refusing to make said finding the defendant excepted, and said exception was allowed by the Court. [507]

ASSIGNMENT OF ERROR No. XVII.

The Court made finding of facts and conclusions of law in writing, including the following, contained in paragraph Three of said findings of fact:

> "That 500 bales were of the quality known as 'No. 1 Canton Steam Waste Silk' and 500 bales were of the quality known as 'No. 2 Canton Steam Waste Silk';"

which the defendant assigns for error for the reason that no evidence was introduced upon the trial indicating the number of bales of the qualities known as No. 1 and No. 2 Canton Steam Silk Waste.

ASSIGNMENT OF ERROR No. XVIII.

Paragraph numbered VIII of the Court's findings includes the following:

> "That on July 30th, 1918, and during the time said bales of waste silk were in course of transportation on said S. S. 'Canada Maru' under the said bills of lading, said vessel stranded and large quantities of salt water entered her holds, and as a result 500 bales of waste silk known as 'Canton Steam Waste Silk No. 1' and 367 bales of said waste silk known as 'Canton Steam Waste Silk No. 2' became wet from the contact with the salt water,"

which finding the defendant assigns for error, for the reason that no evidence was introduced upon the trial indicating the number of bales of the qualities of No. 1 and No. 2 Canton Steam Silk Wastes.

ASSIGNMENT OF ERROR No. XIX.

Paragraph numbered Nine of the Court's findings of fact includes the following:

> "That after the vessel had commenced discharging the wet silk, Mr. Taylor, the representative of the underwriters and owners thereof, called on Mr. Cheney, the Chief Clerk of the Freight Agent at Tacoma, and who was in charge of the dock and the movement of freight therefrom, and told Mr. Cheney that he was very anxious to have quick dispatch of the wet silk, and that it was important that it should go forward in its wet condition. Cheney and Taylor looked at the silk as it was being discharged from the vessel and placed on the dock, and

Taylor requested that it be forwarded by silk train service in refrigerator-cars, and Cheney agreed to so forward it, stating that the cost of such service would be $7.50 per [508] hundred pounds as against the bill of lading freight of $1.75 per hundred, and that there would be an additional charge for refrigeration of approximately $21.00 per car to pay, all of which Taylor agreed to.

On August 14th, Taylor again called on Cheney to see how the matter was progressing, and he and Cheney again examined the silk, and Taylor was told by Cheney that the cars had been ordered and would be brought in shortly, and thereafter the cars were brought in, and approximately one-half of the wet silk bales were loaded on two or more refrigerator-cars for shipment,"

which finding the defendant assigns for error, for the reason that no evidence was introduced upon the trial tending to prove that the person named "Cheney," referred to in said findings, was in charge of the dock or the movement of freight thereupon, or that he had any authority to make or enter into any agreement respecting the transportation of freight, and for the further reason that the uncontradicted evidence in the case and all the evidence upon that point proves affirmatively that said Cheney did not have any authority whatever to make, or enter into, any agreement respecting the transportation of freight, and, for the further

reason, that by the Interstate Commerce Law railroad carriers are strictly prohibited from entering into special contracts, or special service at special rates, for the transportation of freight, and for the further reason that Taylor did not, in fact, pay, or tender payment, or make any promise binding upon the plaintiff to pay extra charges for the services required for transportation of 867 bales by silk train, or the extra charge for transportation of said bales in refrigerator-cars, and for the further reason that said finding does not include the requirement demanded by Taylor for sprinkling or drenching said wet bales so as to keep them continuously wet during the time of transit to destination.

ASSIGNMENT OF ERROR No. XX.

The Court erred in making the finding numbered as paragraph [509] X for the reason that said finding is not true, is not supported by any evidence whatever, and is contrary to all the evidence bearing upon the question as to the making of a special contract for transportation of 867 bales in their wet condition.

ASSIGNMENT OF ERROR No. XXI.

The Court erred in making the finding contained in paragraph thereof, numbered XI, for the reason that the same is not true, is not supported by any evidence, and all the evidence proves affirmatively that the wetting of said 867 bales generated heat and caused diffusion of offensive fumes so that the same were difficult to handle, liable to cause spontaneous combustion and fire while confined in freight-cars and were totally unfit for transporta-

tion without being reconditioned; and for the further reason that the Court's finding that transportation of said bales while in a wet condition was not prohibited by any regulation of the Interstate Commerce Commission, is immaterial.

ASSIGNMENT OF ERROR No. XXII.

The Court erred in its findings of fact in paragraph numbered XII, that the reasonable costs and expense of drying said bales was Five Thousand ($5,000.00) Dollars, which sum the defendant paid therefor, for the reason that no evidence was introduced upon the trial to support a finding as to the reasonable costs and expense of drying said bales, and there was no evidence tending to prove that the plaintiff paid said sum of Five Thousand ($5,000.00) Dollars, or any part thereof. And the evidence proves affirmatively that whatever sum was paid for drying said bales was paid by Frank Taylor, the representative of the Insurers.

ASSIGNMENT OF ERROR No. XXIII.

The Court erred in making the following finding, included in paragraph numbered XII, that the plaintiff, in taking possession of said 867 bales of wet waste silk for the purpose of [510] drying it, as aforesaid, did so without relinquishing any of plaintiff's rights in the premises, for the reason that there was no evidence introduced upon the trial tending to prove that there was any reservation of rights in behalf of any party in taking possession of 867 bales for the purpose of reconditioning the same.

ASSIGNMENT OF ERROR No. XXIV.

The Court erred in making the finding contained

in paragraph numbered XIII, that the natural and proximate result of the drying of said bales of waste silk was a weakening of the fiber and a discoloration of said waste silk, for the reason that there was no evidence introduced upon the trial tending to prove that the drying of said bales had any tendency to weaken the fiber or cause discoloration of said waste silk, and said finding is not true, and all the evidence in the case proves that the damage to 867 bales was entirely due to the wetting thereof.

ASSIGNMENT OF ERROR No. XXV.

The Court erred in making the finding contained in paragraph thereof numbered XIII, that upon arrival of said 867 bales of waste silk at destination, a reasonable, fair market value thereof was the sum of Fourteen Thousand Eight Hundred Fifteen and 67/100 Dollars ($14,815.67), for the reason that there was no evidence introduced upon the trial tending to prove the market value of said bales on arrival thereof at destination, or that said market value was not in excess of the sum aforesaid.

ASSIGNMENT OF ERROR No. XXVI.

The Court erred in making the finding contained in paragraph numbered XIV of its findings of fact, for the reason that no evidence was introduced upon the trial that 500 or any number of bales of wet silk were of the grade known as No. One (1), nor that the market value of said bales of No. 1 was Ninety-five Thousand Three Hundred Ninety-four and 25/100 Dollars ($95,394.25) [511] less ten (10%) per cent, nor that the market value of the

bales of No. 2 quality was of the market value of Forty Thousand Three Hundred Forty-two and 27/100 Dollars less ten (10%) per cent, nor that the total value of said 867 bales was One Hundred Twenty-two Thousand One Hundred Sixty-three and 32/100 Dollars ($122,163.32), and said finding is not true and all of the evidence in the case proves that the quantities and value of 867 bales was One Hundred Thirteen Thousand Eighty-eight and 40/100 Dollars ($113,088.40).

ASSIGNMENT OF ERROR No. XXVII.

The Court erred in making the finding contained in paragraph numbered XV of its findings of fact, for the reason that no evidence was introduced upon the trial tending to prove that the amount payable by the plaintiff for extra service required in transportation of said 867 bales to destination in their wet condition was Six Thousand Seven Hundred Twenty-four and 75/100 Dollars ($6724.75), and said finding is not true because the uncontradicted evidence proves that the tariff of rates on file with the Interstate Commerce Commission made no provision fixing any rate for such or similar extra service and any special contract or special rate for extra service was and is contrary to law.

ASSIGNMENT OF ERROR No. XXVIII.

The Court erred in its findings contained in paragraph thereof numbered XVI, for the reason that no evidence was introduced upon the trial tending to prove that the amount of the plaintiff's damages was One Hundred Five Thousand Six Hundred Twenty-two and 90/100 Dollars ($105,622.90), or

any amount whatever, and the same is not true, and the plaintiff was not damaged in any sum whatever, caused by any act, omission or failure on the part of the defendant to fully perform the contract undertaken and covered by the bills of lading. [512]

ASSIGNMENT OF ERROR No. XXIX.

The Court erred in its findings of fact contained in paragraph thereof numbered XVII, that all or any part of the money paid to the plaintiff by the Atlantic Mutual Insurance Company was a loan, for the reason that all of the evidence introduced upon the trial relating to said payment, proves that said payment was made without any obligation on the part of the plaintiff to repay the same, or any part thereof, except whatever sum might be collected from the defendant, and that the payment made extinguished the liability of the Atlantic Mutual Insurance Company as an insurer of the shipment of silk.

ASSIGNMENT OF ERROR No. XXX.

The Court erred in its conclusions of law in paragraph thereof numbered I, for the reason that by the uncontradicted evidence and all of the evidence introduced upon the trial, it was proved that the plaintiff is not the real party in interest in prosecuting this action, but commenced and maintained the same for the sole benefit of the Atlantic Mutual Insurance Company, and the uncontradicted evidence and all of the evidence introduced on the trial proved that the plaintiff was not the owner of 867 bales at the time when the same were damaged.

ASSIGNMENT OF ERROR No. XXXI.

The Court erred in its conclusions of law con-

tained in paragraph thereof numbered II, for the reason there was no contract between Cheney and Taylor for the movement of 867 bales, that Cheney was not an authorized agent to make any contract binding on the defendant with respect to the transportation of freight, and if such contract had been formally made, it would have been unlawful and unenforceable because expressly forbidden by the provisions of the Interstate Commerce law. [513]

ASSIGNMENT OF ERROR No. XXXII.

The Court erred in its conclusions of law contained in paragraph numbered III thereof, for the reason that the same is contrary to the facts proved on the trial and contrary to the law.

ASSIGNMENT OF ERROR No. XXXIII.

The Court erred in rendering the judgment against the defendant, for the reason that the findings of fact as made and signed by the Court are insufficient to justify the conclusions of law and insufficient to support said judgment.

ASSIGNMENT OF ERROR No. XXXIV.

The Court erred in rendering a final judgment in this action, for the reason that instead of being in favor of the plaintiff, the right judgment should have been in favor of the defendant.

WHEREFORE, the defendant prays the United States Circuit Court of Appeals for the Ninth Circuit for a review of this action, pursuant to the writ of error to be sued out herein; and to reverse the final judgment of the District Court for the

Western District of Washington, Southern Division.

GEO. W. KORTE,
C. H. HANFORD,
Attorneys for Defendant.

[Indorsed]: Filed in the U. S. District Court, Western District of Washington, Southern Division. Feb. 14, 1922. F. M. Harshberger, Clerk. [514]

United States District Court, Western District of Washington, Southern Division.

No. 2905.

AMERICAN SILK SPINNING COMPANY, a Corporation,

Plaintiff,

vs.

THE DIRECTOR GENERAL OF RAILROADS, (Operating the Chicago, Milwaukee & St. Paul Railway),

Defendant.

Petition for Writ of Error and Order Granting Same.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The defendant in the above-entitled action being aggrieved by errors in the proceedings, decision and judgment of the Court in said action, comes now by his attorneys and presents an assignment of the alleged errors, which he desires to submit to the Honorable Circuit Court of Appeals for the

Ninth Circuit, and hereby prays for an order granting a Writ of Error to be directed to the above-entitled District Court on which the record in said cause may be certified to said Circuit Court of Appeals; and fixing the amount of the bond for costs required on said Writ of Error.

GEO. W. KORTE,
C. H. HANFORD,
Attorneys for Said Defendant.

ORDER.

On this 17th day of February, 1922, the above petition, with an assignment of alleged errors was duly presented to the undersigned, one of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, and thereupon, it is by me ordered that, said petition be and the same is hereby granted; that a writ of error do issue directed to the United States District Court for the Western District of Washington, Southern Division; and that the amount of the cost bond on said [515] writ of error be and the same is hereby fixed at the sum of Five Hundred Dollars.

This order granted and signed at the City of San Francisco in the State of California this 17th day of February, 1922.

WM. B. GILBERT,
United States Circuit Judge for the Ninth Circuit.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Feb. 20, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [516]

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE DIRECTOR GENERAL OF RAILROADS,
Plaintiff in Error,

vs.

AMERICAN SILK SPINNING COMPANY,
Defendant in Error.

Petition for Order Enlarging Time for Filing the Transcript (Copy).

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

The defendant in this case having sued out a writ of error respectfully shows that the record in this cause is voluminous so that it is not practicable for the Clerk of the District Court to complete a transcript thereof within the time prescribed for filing the same; and for that reason prays for an order extending the time for filing the transcript in the Circuit Court of Appeals to and including the third day of April, 1922.

GEO. W. KORTE,
C. H. HANFORD,
Attorneys for Plaintiff in Error.

Order Extending Time to and Including April 3, 1922, to File Record and Docket Cause (Copy).

And now, on this 17th day of February, 1922, for the cause shown by the above petition, it is by the undersigned, one of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit,

ORDERED: That, the time for filing the transcript of the record and docketing the cause in this Court be and the same is hereby extended to and including the third day of April, 1922.

WM. B. GILBERT.
Circuit Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Feb. 20, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [517]

United States District Court, Western District of Washington, Southern Division.

No. 2905.

AMERICAN SILK SPINNING COMPANY, a Corporation,

Plaintiff,

vs.

THE DIRECTOR GENERAL OF RAILROADS (Operating the Chicago, Milwaukee & St. Paul Railway),

Defendant.

Bond on Writ of Error (Copy).

KNOW ALL MEN BY THESE PRESENTS: That we, the Director General of Railroads, defendant in the above-entitled action, as principal, and the National Surety Company of New York, a corporation, as surety, are held and firmly bound unto the American Silk Spinning Company, a corpora-

tion, plaintiff in the above-entitled action in the sum of Five Hundred Dollars, for the payment of which well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our successors, firmly by these presents.

Sealed with our seals and dated the —— day of ———, 1922.

Whereas, the above-named defendant has sued out a writ of error to the above-entitled District Court, for a review of its decision and final judgment against said defendant in the above-entitled action.

Now, therefore, the condition of this obligation is such that if said defendant shall prosecute said writ of error to effect and answer all costs and damages, if he fails to make his plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

———————————,
Director General of Railroads,
By GEO. W. KORTE,
His Attorney.

NATIONAL SECURITY COMPANY OF NEW YORK,
[Corporate Seal] By ROLLO C. WHYTE,
Attorney in Fact. [518]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Feb. 20, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [519]

United States District Court, Western District of Washington, Southern Division.

No. 2905.

AMERICAN SILK SPINNING COMPANY, a Corporation,

Plaintiff,

vs.

THE DIRECTOR GENERAL OF RAILROADS (Operating the Chicago, Milwaukee & St. Paul Railway),

Defendant.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled District Court:

For a review of this cause on the writ of error sued out by the defendant herein, please prepare, certify and transmit to the United States Circuit Court of Appeals for the Ninth Circuit a complete transcript of the record herein, including the following:

1. The pleadings, consisting of the complaint, answer and reply.
2. All orders of the Court and entries in the record of proceedings including the record of the trial, and the judgment.
3. All stipulations on file.
4. The Court's findings of facts and conclusions of law; two papers, viz., orginal and duplicate, with exceptions noted to each.
5. The defendant's two bills of exceptions.

5½. The assignments of error.

6. This praecipe; and the bond on writ of error. Petition and order allowing writ.

And with said transcript, transmit the original writ of error, the original citation, and the original petition for enlargement of the time for filing said transcript in the Circuit Court of Appeals, with the order granting the same; and all the original exhibits introduced on the trial by both parties.

GEO. W. KORTE,
C. H. HANFORD,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Feb. 29, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [520]

In the District Court of the United States, for the Western District of Washington, Southern Division.

No. 2905.

AMERICAN SILK SPINNING COMPANY, a Corporation,

Plaintiff,

vs.

THE DIRECTOR GENERAL OF RAILROADS (Operating the Chicago, Milwaukee & St. Paul Railway),

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, F. M. Harshberger, Clerk of the above-entitled District Court, DO HEREBY CERTIFY that the foregoing transcript, comprising typewritten pages numbered consecutively from one to 527, contains a full, true and correct copy of the record and proceedings of said District Court in the case wherein the American Silk Spinning Company is plaintiff and the Director General of Railroads, operating the Chicago, Milwaukee & St. Paul Railway, is defendant; and contains all of the matter which I am required, by the praecipe of the plaintiff in error, to transmit to the United States Circuit Court of Appeals for the Ninth Circuit, and that the same constitutes the record on writ of error from the judgment of said District Court, which writ of error was lodged and filed in my office on the twenty-third day of February, 1922.

I further certify that I attach hereto and herewith transmit the original writ of error and the original citation issued in said cause and the bond on writ of error.

I further certify that I herewith transmit all of the original exhibits introduced by the plaintiff and defendant respectively, which I am, by order of the Court, required to transmit to the Circuit Court of Appeals for the Ninth Circuit. [521]

I further certify that the fees of the Clerk for preparing and certifying said transcript and forwarding said exhibits amount to the sum of Two

Hundred and Twelve Dollars and Fifty Cents, which amount has been paid to me in full by the attorney for the plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Tacoma in said District, this sixteenth day of March, 1922.

[Seal] F. M. HARSHBERGER,
Clerk.
By Ed M. Lakin,
Deputy Clerk [522]

United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

JAMES C. DAVIS, Director General of Railroads, and Agent Appointed Under the Transportation Acts of 1920, Operating the Chicago, Milwaukee & St. Paul Railway,
Plaintiff in Error,

vs.

AMERICAN SILK SPINNING COMPANY, a Corporation,
Defendant in Error.

Writ of Error (Copy).

United States of America,—ss.

The President of the United States to the Honorable Judges of the District Court of the United States for the Western District of Washington, Southern Division, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between the American Silk Spinning Company a corporation, named as the plaintiff therein, and the Director General of Railroads, operating the Chicago, Milwaukee & St. Paul Railway, named as the defendant therein, a manifest error hath happened to the great damage of James C. Davis, Director General of Railroads, operating the Chicago, Milwaukee & St. Paul Railway and agent appointed under the Transportation Acts of 1920, plaintiff in error herein, as by this petition herein appears:

We being willing that error, if any, hath happened, should be corrected and full and speedy justice be done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, [523] together with this writ, so that you have the same at San Francisco in the State of California within thirty days from the date hereof, in the said Circuit Court of Appeals, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause to be done further therein to correct that error, what of right and according to law and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of

the United States, and the seal of this court, this 23d day of February, in the year of our Lord one thousand nine hundred and twenty-two.

[Court Seal] F. M. HARSHBERGER,
Clerk.
By Ed M. Lakin,
Deputy Clerk of the District Court of the United States for the Western District of Washington, Southern Division.

Allowed by

WILLIAM B. GILBERT,
United States Circuit Judge.

Service of the within writ of error and receipt of a copy thereof is hereby acknowledged this 23d day of February, A. D. 1922.

BALLINGER, BATTLES, HULBERT & SHORTS,
J. M. RICHARDSON WYETH,
Attorneys for Defendant in Error.

[Indorsed]: Filed in the United States District Court, Southern Division. Feb. 23, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy Clerk. [524]

Return to Writ of Error (Copy).

And thereupon it is ordered by the Court that, the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit and the same is transmitted accordingly.

By the Court:
[Seal] F. M. HARSHBERGER,
Clerk.
By Ed M. Lakin,
Deputy Clerk of the United States District Court for the Western District of Washington, Southern Division. [525]

United States Circuit Court of Appeals for the Ninth Circuit.

No. ——

JAMES C. DAVIS, Director General of Railroads and Agent Appointed Under the Transportation Acts of 1920 Operating the Chicago, Milwaukee & St. Paul Railway,
Plaintiff in Error,
vs.
AMERICAN SILK SPINNING COMPANY, a Corporation,
Defendant in Error.

Citation (Copy).

United States of America,—ss.
The President of the United States of America to the American Silk Spinning Company, a Corporation, Defendant in Error, GREETING:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the courtroom of said court in the City of San Francisco and State of California,

within thirty days from the date of this citation, pursuant to a writ of error on file in the clerk's office of the District Court of the United States in and for the Western District of Washington, Southern Division, wherein James C. Davis, Director General of Railroads, Operating the Chicago, Milwaukee & St. Paul Railway and Agent Appointed Under the Transportation Acts of 1920, is plaintiff in error, and the American Silk Spinning Company, a corporation is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of [526] the Supreme Court of the United States, this 23d day of February, A. D. 1922.

EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington.

Attest: F. M. HARSHBERGER,
Clerk.
By Ed M. Lakin,
Deputy.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Feb. 23, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [527]

[Endorsed]: No. 3845. United States Circuit Court of Appeals for the Ninth Circuit. James C. Davis, as Director General of Railroads, Operating the Chicago, Milwaukee & St. Paul Railway and Agent Appointed Under the Transportation Acts of 1920, Plaintiff in Error, vs. American Silk Spinning Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed March 20, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States District Court, Western District of Washington, Southern Division.

No. 2905.

AMERICAN SILK SPINNING COMPANY, a Corporation,

Plaintiff,

vs.

THE DIRECTOR GENERAL OF RAILROADS (Operating the Chicago, Milwaukee & St. Paul Railway),

Defendant.

Bond on Writ of Error (Original).

KNOW ALL MEN BY THESE PRESENTS: That we, the Director General of Railroads, defendant in the above-entitled action, as principal, and the National Surety Company of New York, a corporation, as surety, are held and firmly bound unto the American Silk Spinning Company, a corporation, plaintiff in the above-entitled action in the sum of Five Hundred Dollars, for the payment of which well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our successors, firmly by these presents.

Sealed with our seals and dated the 20th day of February, 1922.

WHEREAS, the above-named defendant has sued out a writ of error to the above-entitled District Court, for a review of its decision and final judgment against said defendant in the above-entitled action.

Now, therefore, the condition of this obligation is such that if defendant shall prosecute said writ of error to effect and answer all costs and damages, if he fails to make his plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

_____,
Director General of Railroads.
By GEO. W. KORTE,
His Attorney.

NATIONAL SURETY COMPANY OF NEW YORK,
[Seal] By ROLLO C. WHYTE,
Attorney in Fact.

Approved this —— day of Feby.,——.

_____,

Judge.

[Endorsed]: No. 2909. United States District Court for the Western District of Washington, Southern Division. American Silk Spinning Co. vs. Director General of Railroads. Bond on Writ of Error. Filed in the United States District Court, Western District of Washington, Southern Division, Feb. 20, 1922. F. M. Harshberger, Clerk, By Ed M. Lakin, Deputy.

No. 3845. United States Circuit Court of Appeals for the Ninth Circuit. Filed Mar. 20, 1922. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. ——

JAMES C. DAVIS, Director General of Railroads, and Agent Appointed Under the Transportation Acts of 1920, Operating the Chicago, Milwaukee & St. Paul Railway,

Plaintiff in Error,

vs.

AMERICAN SILK SPINNING COMPANY, a Corporation,

Defendant in Error.

Writ of Error (Original).

United States of America,—ss.

The President of the United States to the Honorable Judges of the District Court of the United States for the Western District of Washington, Southern Division, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between the American Silk Spinning Company, a corporation, named as the plaintiff therein, and the Director General of Railroads, operating the Chicago, Milwaukee & St. Paul Railway, named as the defendant therein, a manifest error hath happened to the great damage of James C. Davis, Director General of Railroads, operating the Chicago, Milwaukee & St. Paul Railway, and Agent appointed under the Transportation Acts of 1920, plaintiff in error herein, as by his petition herein appears:

We being willing that error, if any, hath happened, should be corrected and full and speedy justice be done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco in the State of California within thirty days from the date hereof, in the said Circuit Court of Appeals, that the record

and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause to be done further therein to correct that error, what of right and according to law and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States and the seal of this Court, this 23d day of February, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal] F. M. HARSHBERGER,
Clerk.
By Ed M. Lakin,
Deputy Clerk of the District Court of the United States for the Western District of Washington, Southern Division.

Allowed by:

WILLIAM B. GILBERT,
United States Circuit Judge.

Service of the within writ of error and receipt of a copy thereof is hereby acknowledged this 23d day of February, A. D. 1922.

BALLINGER, BATTLE, HULBERT & SHORTS,
J. M. RICHARDSON LYETH,
Attorneys for Defendant in Error.

Return to Writ of Error (Original).

And thereupon it is ordered by the Court that, the foregoing transcript of the record and proceed-

ings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit and the same is transmitted accordingly.

By the Court:

[Seal] F. M. HARSHBERGER,
Clerk.

By Ed M. Lakin,
Deputy Clerk of the United States District Court for the Western District of Washington, Southern Division.

[Endorsed]: No. ——. James C. Davis, Director General of Railroads, vs. American Silk Spinning Company. Writ of Error. Filed in the United States District Court, Western District of Washington, Southern Division. Feb. 23, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy.

No. 3845. United States Circuit Court of Appeals for the Ninth Circuit. Filed Mar. 20, 1922. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

JAMES C. DAVIS, Director General of Railroads, and Agent Appointed Under the Transportation Acts of 1920 Operating the Chicago, Milwaukee & St. Paul Railway,

Plaintiff in Error,

vs.

AMERICAN SILK SPINNING COMPANY, a Corporation,

Defendant in Error.

Citation (Original).

United States of America,—ss.

The President of the United States of America to to the American Silk Spinning Company, a Corporation, Defendant in Error, GREETING:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said Court in the City of San Francisco and State of California, within thirty days from the date of this citation, pursuant to a writ of error on file in the clerk's office of the District Court of the United States in and for the Western District of Washington, Southern Division, wherein James C. Davis, Director General of Railroads, operating the Chicago, Milwaukee & St. Paul Railway, and Agent appointed under the Transportation Acts of 1920, is plaintiff

in error, and the American Silk Spinning Company, a corporation, is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 23d day of February, A. D. 1922.

EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington.

Attest: F. M. HARSHBERGER,
Clerk.
By Ed M. Lakin,
Deputy Clerk.

Service of the within citation and receipt of a copy thereof, this 23d day of February, 1922, is hereby acknowledged.

BALLINGER, BATTLE, HULBERT & SHORTS,
J. M. RICHARDSON LYETH,
Attorneys for Defendant in Error.

[Endorsed]: No. ——. James C. Davis, Director General of Railroads, vs. American Silk Spinning Company. Citation. Filed in the United States District Court, Western District of Washington, Southern Division. Feb. 23, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy.

No. 3845. United States Circuit Court of Ap-

peals for the Ninth Circuit. Filed Mar. 20, 1922. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

JAMES C. DAVIS, Director General of Railroads, and Agent Appointed Under the Transportation Acts of 1920 Operating the Chicago, Milwaukee & St. Paul Railway,

Plaintiff in Error,

vs.

AMERICAN SILK SPINNING COMPANY, a Corporation,

Defendant in Error.

Acknowledgment of Service of Citation (Original).

Comes now the American Silk Spinning Company, a corporation, defendant in error, and admits service upon it of the citation issued out of the above-entitled court in the above-entitled cause, and hereby enters its appearance in said cause.

Dated Seattle, Washington, March 16, 1922.

AMERICAN SILK SPINNING COMPANY, a Corporation,

Defendant in Error.

J. M. RICHARDSON LYETH,
R. A. BALLINGER,
ALFRED BATTLE,
ROBT. HULBERT,
BRUCE C. SHORTS,
Attorneys for Defendant in Error.

Copy of within appearance received and due service thereof acknowledged this March 17, 1922.

GEO. W. KORTE,
C. H. HANFORD,
Attorneys for Plaintiff in Error.

[Endorsed]: No. 3845. In the United States Circuit Court of Appeals for the Ninth Circuit. James C. Davis, Director General of Railroads and Agent Appointed Under the Transportation Acts of 1920 Operating the Chicago, Milwaukee & St. Paul Railway, Plaintiff in Error, vs. American Silk Spinning Company, a Corporation, Defendant in Error. Filed Mar. 20, 1922. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE DIRECTOR GENERAL OF RAILROADS,
Plaintiff in Error,

vs.

AMERICAN SILK SPINNING COMPANY,
Defendant in Error.

Petition for Order Enlarging Time for Filing the Transcript (Original).

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

The defendant in this cause having sued out a writ of error respectfully shows that the record in this cause is voluminous so that it is not practicable for the Clerk of the District Court to com-

plete a transcript thereof *with* the time prescribed for filing the same; and for that reasons prays for an order extending the time for filing the transcript in the Circuit Court of Appeals to and including the third day of April, 1922.

GEO. W. KORTE,
C. H. HANFORD,
Attorneys for Plaintiff in Error.

Order Extending Time to and Including April 3, 1922, to File Record and Docket Cause (Original).

And now, on this 17th day of February, 1922, for the cause shown by the above petition, it is by the undersigned, one of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, ORDERED: That, the time for filing the transcript of the record and docketing the cause in this court be, and the same is hereby, extended to and including the third day of April, 1922.

WM. B. GILBERT,
Circuit Judge.

[Endorsed]: U. S. District Court of Appeals for the Ninth Circuit. Petition for and Order Extending Time for Filing Transcript. Filed in the United States District Court, Western District of Washington, Southern Division. Feb. 20, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy.

No. 3845. United States Circuit Court of Appeals for the Ninth Circuit. Filed Mar. 20, 1922. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

JAMES C. DAVIS, Director General of Railroads, and Agent Appointed Under the Transportation Acts of 1920 Operating the Chicago, Milwaukee & St. Paul Railway,

Plaintiff in Error,

vs.

AMERICAN SILK SPINNING COMPANY, a Corporation,

Defendant in Error.

Statement Designating Parts of Record to be Printed.

To F. D. Monckton, Clerk:

The plaintiff in error herein hereby designates as the errors on which he intends to rely and the parts of the record which he thinks necessary for the consideration thereof:

The plaintiff in error will rely upon each and all of the errors specified in the assignments of error contained in the transcript of the record, numbered consecutively from Number I to Number XXXIV, both inclusive, and, in support of his contentions, he requires to be printed for the consideration of the Court the following matter:

All of the transcript of the record, including the Clerk's certificate.

All of the documentary exhibits designated as Plaintiff's Exhibits numbered 1–A, 2–A, 3–A, 4–A and 5–A.

All of the documentary exhibits designated as

Defendant's Exhibit No. 19, Cargo Plan of Ship;

Defendant's Exhibit No. 20, Copy of Ship's Log;

Defendant's Exhibit No. 21, Report of J. Ayton, Cargo Surveyor;

Defendant's Exhibit No. 24, Diagram of Mackey Cloth Oil Tester;

Defendant's Exhibit No. 28, Insurance Policy;

Defendant's Exhibit No. 29, Three Receipts for money paid.

Defendant's Exhibit No. 30, American Railway Express Company Receipt. (Print only the face of that paper, omitting matter on the reverse side thereof.)

The writ of error, the citation and order extending the time for filing the transcript and docketing the case.

GEO. W. KORTE,
C. H. HANFORD,
Attorneys for Plaintiff in Error.

A true copy of the within statement, designating parts of record to be printed, received and due service of same acknowledged, this 17th day of March, 1922.

J. M. RICHARDSON LYETH,
BALLINGER, BATTLE, HULBERT & SHORTS,
Attorneys for Defendant in Error.

[Endorsed]: No. 3845. United States Circuit Court of Appeals for the Ninth Circuit. Filed Mar. 20, 1922. F. D. Monckton, Clerk.

Plaintiffs' Exhibit No. 1–A.

[Endorsed]: Case No. 2905. Plaintiffs' Exhibit 1–A. United States District Court, Western Dist. of Washington. American Silk Spinning Co. vs. Chicago, Milwaukee & St. Paul Ry. Co. Filed Oct. 26, 1921. ————, Clerk.

No. 3845. United States Circuit Court of Appeals for the Ninth Circuit. Filed Mar. 20, 1922. F. D. Monckton, Clerk.

Seattle, Wash., August 31, 1918.

Mr. Frank G. Taylor, Underwriters Agent,
264 Colman Building,
Seattle, Washington.

Dear Sir:

Referring to the subscriber's conversation with you of yesterday:

We confirm our proposal to you herewith, viz., that you are to deliver to us on our spur track in Seattle, 867 bales, more or less, of waste silk discharged Ex. "CANADA MARU" in damaged condition and saturated with salt water and now heating in cars at Tacoma, which silk you are desirous of drying and putting in condition so that heating will be stopped and silk re-baled and put in condition satisfactory to Milwaukee Railroad for shipment to destination.

We now propose to dry this silk waste for you at our plant in South Seattle by opening the bales and spreading the waste out on clean lumber or hanging same on lines and drying in the open air.

After drying we will bale same in such packages and in such manner as will be acceptable to railroad and in such manner as will not increase the freight rate as would have applied to original packages.

We agree to pay cost of unloading silk from cars at our plant, and also cost of reloading silk into cars for shipment after drying.

For services above specified our charges will not exceed $5000.00.

Should you accept this proposal, it is understood that we are not to be held responsible for loss or damage caused by fire while silk is on our premises.

Yours very truly,

PACIFIC OIL MILLS,

By HERMAN MEYER.

Approved and accepted:

FRANK G. TAYLOR,

Underwriters Agent.

Case No. 2405
Offs Ex. #2-a

Return Dec. 689600

A No 1.

Bill of Lading No. 9

OSAKA SHOSEN KAISHA, L'D.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.,

(In connection with other carriers on the route to destination)

THROUGH TRANS-PACIFIC & OVERLAND BILL OF LADING.

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Bill of Lading at Canton

on 1 June 1918, from Hongkong via

the property described below, in apparent good order and condition except as noted, (contents and condition of contents unknown), marked, consigned and destined as indicated below for shipment on board Steamship "Canada Maru" whereof

is Master, now lying in the Port of Hongkong and bound for the Port of "A," Tacoma or Seattle, Washington, U.S.A., which the Osaka Shosen Kaisha agrees to transport to the said Port of "A," Tacoma or Seattle, (with leave to tow or assist vessels in distress) to sail with or without pilot; to trans-ship to any other steamer, to warehouse or lighter from steamer to steamer and from steamer to shore; and to touch at any port or ports in any rotation or order in or out of the customary route; and to call at any port or ports more than once), and there in like apparent good order and condition deliver the same to the Chicago, Milwaukee & St. Paul Railway Company, to be transported by the said Chicago, Milwaukee & St. Paul Railway Company, and their railway or steamship connection to the point of "B," Providence, R.I, there in like apparent good order and condition to be delivered unto consignee, or to his or their assigns, upon payment immediately upon discharge of the property of the freight charges thereon at the rate from Hongkong to Tacoma or Seattle, Wash., of (shown below) per 100 pounds gross weights and from Tacoma or Seattle, Wash., to Providence R.I at the rate of (shown below) per 100 pounds gross weight, together with all advanced charges, if any, and all other charges and average, without any allowance of credit or discount, all payable at the Steamship Company's option in advance in local currency, the equivalent of United States Gold Coin, at current bank demand rate of exchange, or on delivery of the freight, in United States Gold Coin.

IT IS MUTUALLY AGREED as to each carrier of all or any of said property over all or any of said route to destination, and as to each party at any time interested in all or any of said property, that in consideration of the rates of freight herein named every service to be performed hereunder shall be subject to the conditions, whether printed or written herein contained (including conditions on back hereof,) all of which conditions as agreed to by the shipper and accepted for himself and his assigns as just and reasonable.

The surrender of this BILL of LADING properly endorsed shall be required before delivery of the property. Inspection of the property covered by the Bill of Lading will not be permitted unless provided by law, or unless permission is endorsed on this BILL of LADING, or given in writing by the shipper.

CONSIGNED TO Order of Meurs Heidelbach Ickelheimer

DESTINED TO Normal Consignees: - New York

NOTIFY

AT The American Silk Spinning Co. Providence R.I.

Marks and Numbers	Nos. of Packages	Description of Articles	Value
$ (W) O 68½ 60¼ PROVIDENCE	200	Waste Silk	

* Agent issuing Bill of Lading must state whether figures shown are "Shippers" or Carriers.

Commodity	Measurements (Subject to Correction)	Weight	Steamship Rate and Charges: Rate per 100 lbs. G.$	Steamship Rate and Charges: Charges G.$	Inland Rate and Charges: Rate per 100 lbs. G.$	Inland Rate and Charges: Charges G.$	Total Charges G.$
Waste Silk	12.42 M/T	27800 lbs	1.55	430.90	1.10	289.30	288.12
Total.							576.82

Shipper's weight & measurement may be readjusted at U.S.K. option at Seattle and/or Tacoma, to be paid by Consignees before delivery.

All Charges, if any incurred at Seattle and/or Tacoma, to be paid by Consignees before delivery.

Owing to railway connection this Company shall not be held responsible for any delay in forwarding shipment at Seattle and/or Tacoma

Goods destined to or via Seattle may be discharged at the Carrier's option.

The Company reserves the right to dispose of or abandon the goods at shippers' risk and expense in case the importation of same be refused by the authorities at destination, or in any stage of transit.

If charges are to be prepaid, write or stamp here: "To be prepaid"

RECEIVED $ to apply in prepayment of the charges on the property described herein

RIVER FREIGHT CARED FOR BY SHIPPERS'

Railway Rates subject to further payment by consignees in case of advances.

Freight Paid.

(signature here acknowledges only the amount prepaid)

IN WITNESS WHEREOF: The agent of the Osaka Shosen Kaisha, on behalf of that Company separately, and acting as agent of the Chicago, Milwaukee & St. Paul Railway Company and their rail and water connections jointly, hath affirmed to Nine Bills of Lading excluding Captain's copy, all of this tenor and date, one of which Bills of Lading having been accomplished, the others to stand void.

DATED at Canton this 21st day of June 1918

For Master.

Not responsible for any consequence on behalf of the Steamship Company separately, and of the Railway Carriers and their connections jointly), direct or indirect, resulting from a

1260

545

6469

Bill of Lading No. _____

OSAKA SHOSEN KAISHA L'D.

CHICAGO

vices until delivery at the Port of "A," Tacoma or Seattle, first before mentioned, it is hereby agreed that the Steamship Company, y or all of the property herein described shall not be liable for any loss thereof damage thereto, except as hereinafter provided:

1. In possession of the property, shall not be liable for any loss thereof or damage thereto or delay caused by the acts of God, King's enemies, restraints of Government, pirates, thieves, assailing, barratry of the master, mariners, or other persons, fire, explosion, collision, stranding, at home or abroad, detention and unavoidable [illegible] upon the employment of any vessel in the usual or special service of the imperial government of Japan, pilferage, vermin, reasonable wear and tear of packages, [illegible], climatic effects, loss or damage from machinery, boilers or steam, however caused, or from collision, stranding or wreck, however caused, errors in judgment, negligence or [illegible] er, masters, engineers or any persons in the service of the Steamship Company, whether in navigating or otherwise, risk of craft, or transshipment, and each of all the dangers and [illegible] ons and of navigation generally of whatsoever nature and kind.

(In connection with other carriers on the Outward Journey)

2. Prepaid Freight can not be reclaimed, ship or goods lost or not lost, and the owners, or consignees shall pay the freight and all other lawful charges accruing on said property, and if required shall pay the same in advance. If, upon inspection, it is ascertained that the articles shipped are not those described in the Bill of Lading the freight charges must be paid upon the articles actually shipped.

3. In case any or all of the property described herein shall be transferred from the [illegible] forwarded in lighters [illegible] carried by the [illegible] the port of shipment, the Steamship Company is only responsible for such property while [illegible] and [illegible] risk of the [illegible] transferred to the [illegible] carried by any other steamer or steamers, either its own or [illegible] owners' risk [illegible] shipped to destination by [illegible] which services, however, to be borne by the Steamship Company.

4. In case of any port or ports being interdicted by blockade, or if the entering and or discharging of cargo in such port or ports shall be considered unsafe by reason of war or disturbance, the Master of the Steamship may discharge the property described herein intended for all or any of these ports, at the nearest safe and available port, at his discretion, and at the risk and expense of the owner of the property; and the Steamship Company's responsibility shall cease whenever the property shall have been so discharged into proper and safe keeping, the Master of the steamship giving immediate notice of the disposition of the property to the consignee so far as can be ascertained.

5. In the event that any vessel in the service of the said Steamship Company shall render assistance to the vessel carrying the property described in this Bill of Lading, entailing the assisting vessel to salvage reward, or any remuneration for such service, such salvage or [illegible] shall be equal to that [illegible] as if the assisting vessel were in the service of another company, or person.

6. General Average shall be payable according to York-Antwerp Rules, 1890, and Antwerp Rule, 1903.

7. If the shipowners shall have exercised due diligence to make the Steamer in all respects seaworthy and to have had properly manned, equipped, and supplied, it is hereby agreed that in case of danger, damage or disaster, resulting from accident, fault or error in the management of the Steamer, or from any latent or other defect in the Steamer, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of voyage (provided the defect of the unseaworthiness was not discoverable by the exercise of due diligence), the Shippers, Consignees or Owners of the cargo, shall, nevertheless, pay salvage, and any special charges incurred in respect to the cargo, and shall contribute, with the Shipowners in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril all with the same force and effect, and to the same extent, as if such accident, danger, damage or disaster had not resulted from, or been occasioned by faults or errors in navigation, or in the management of vessels, or any latent or other defect or unseaworthiness.

8. The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee including the freight charges, if paid) at the place and time of shipment unless such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

9. All lighterage from steamer to steamers, and, or between steamers and shore of the property named in this Bill of Lading will be at the risk of the owner of such property.

10. In case of quarantine, the property described herein may be discharged into the quarantine depot, hulk, or other vessel as required for the steamship's despatch, and quarantine expenses of whatever nature or kind upon the property shall be borne by the owner of same.

11. Property carried on deck solely at the owner's risk. Plants, vegetables, and all packable goods, glass, crockery, or articles inclosed in glass or crockery or castings, or any articles of a fragile nature are accepted by the Steamship Company solely at the risk of the owner of the property.

12. All fines, and expenses, and losses by detention of the vessel or carrier caused by incorrect markings, or by incomplete or incorrect description of contents, or lack of other particulars required by the authorities at any stage of the transit shall be borne by the owners of such property.

13. Any property of an explosive, inflammable, dangerous or injurious nature, or one not being previously declared, and especially arranged for, is liable upon discovery to be thrown overboard or otherwise destroyed without any compensation whatever, and the owner of such property, who will further more be held responsible for all consequent loss or damage resulting from shipment of same, or expense incurred in connection therewith.

14. The Steamship Company shall not be accountable or responsible for weights, or for loss or damage resulting through the obliteration of marks or numbers, or from insufficiency of address, or caused by other cargo in contact or otherwise, when property stowed, or for loss or damage to the property described herein from any cause whatever, or for loss of any property, caused by bad or insufficient packing being contrary to the [illegible]

15. There shall be likewise borne exclusively by the shippers, owner, or consignee of the property described in this Bill of Lading the risk of loading and discharging, stay on shore or afloat in care of customs to the quarantine station, on the quay, in a public or private warehouse, the risk of [illegible] on board or transport to another vessel in case of transhipment, also forwarding to any means and in every direction, even in the case of non-discharge at the place of destination, and all risk and expense whether on account of [illegible] or any other cause whatsoever, prior to delivery of the cargo mentioned in this Bill of Lading into the ship's tackles of the Steamship Company.

16. It is further understood that property covered by this Bill of Lading subject to all conditions expressed in the approved form of Bills of Lading [illegible] Steamship Company at the time of shipment.

17. The Steamship Company is not liable for [illegible] the property [illegible] the tracks of connecting Railroad Railway Company at the "A," Tacoma or Seattle.

PLEASE DELIVER TO

OR ORDER.

(B) With respect to the service after delivery at the Port "A," first before mentioned, and until delivery at the Point "B," second before mentioned, it is agreed that:—

1. No carrier or party in possession of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of the Public Enemy, Quarantine authority of law, or the act or default of the shipper, or owner, or for inherent vice or nature of the property, or for any loss or damage or delay caused by any of the following matters or things, namely: Collision, perils of the sea, [illegible] or other navigable waters, explosion, bursting of boilers, breakage of shafts, or any latent defects in hull, machinery or appurtenances, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at the intermediate ports, to tow and be towed, saving vessels in distress, and deviate for the purpose of saving life or property.

2. Except in the case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage or delay occurring while the property described herein is stopped and held in transit upon request of the shipper, owner of party entitled to make such request; or resulting from a defect or vice in the property, or from the risks or strikes.

3. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in the case of loss or damage by fire, in which case the liability shall be the same as though the property has been carried in closed cars), shall be liable only for its negligence, and the burden to prove freedom from such negligence shall be on the carriers or party in possession.

4. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable despatch. The rail carriers herein shall have the right in case of physical necessity to forward said property by any railroad line between the Port of "A," Tacoma or Seattle, and the Point to which the rate is given, but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

5. No carrier shall be liable for loss, damage, or injury not occurring on its own road, or its portion of the through route, or after said property has been delivered to the next carrier except such liability as may be imposed by law.

6. The amount of any loss or damage or which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid), at the place and time of shipment under this Bill of Lading, unless a lower value has been represented in writing by the shipper, or has been agreed upon, or is determined by the classification or tariff, upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

7. Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

8. Any carrier or party liable on account of loss or of damage to any of said property shall, by right of subrogation, have the full benefit of any insurance that may have been effected upon or on account of said property.

9. All property shall be subject to the necessary cooperage and baling at owner's cost.

10. Property destined to a station, wharf, or landing where there is no regularly appointed agent shall be entirely at the risk of the owner after being unloaded from the cars or vessels, and when delivered on private or other sidings, or on the landings shall be at the owner's risk after the cars are detached from the trains.

11. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless special agreement to do so and a stipulated value of the articles are indorsed hereon.

12. Every party, whether principal or agent, shipping explosive or dangerous goods without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense, or destroyed without compensation.

13. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and if required shall pay the same before delivery. If, upon inspection, it is ascertained that the articles shipped are not those described in this Bill of Lading the freight charges must be paid upon the articles actually shipped.

14. Except in case of diversion from a rail to a water route, which is provided for by section 4 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations and exemptions provided by statue and to the conditions contained in this Bill of Lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defects in hull, machinery or appurtenances; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at the intermediate ports, to tow and be towed, saving vessels in distress, and deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage across the rivers or in lakes or other harbors and the liability for such lighterage shall be governed by the other sections of this instrument.

15. Property not claimed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice to it or has been duly mailed or given shall be kept in the car, depot or place of delivery of the carrier, or warehouse subject to a reasonable charge for storage and to carriers responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (inclusive of legal holidays) for loading or unloading, and may add such charge to all other charge hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as existing acids any local rules affecting carriers in storage.

This Bill of Lading is issued subject to the terms and conditions of the Act of Congress of the United States of America, relating to the Navigation, etc., approved on the 13th day of February, 1893.

Any alteration, addition or, or erasure from this Bill of Lading which shall be made without an endorsement thereof hereon, signed by the agent of the carrier issuing this Bill of Lading shall be without effect, and this Bill of Lading shall be enforceable according to its original teoor.

Two copies of this Bill of Lading duly endorsed, must be sent to the consignee, to effect the customhouse entry and delivery of the goods.

F. D. MONCKTON.

MAR 20 1922

FILED
IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 3845

Case 2405 Exhibit #3-a

License No. 68961

A No 1.

Bill of Lading No. 10

OSAKA SHOSEN KAISHA, L'D.

Chicago, Milwaukee & St. Paul Railway Co.,

(In connection with other carriers on the route to destination)

THROUGH TRANS-PACIFIC & OVERLAND BILL OF LADING.

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Bill of Lading at Canton

on 24 June 19 18, from Hogg Kwangsze Co

the property described below, in apparent good order and condition except as noted, (contents and condition of contents unknown), marked, consigned and destined as indicated below for shipment on board Steamship Canada Maru whereof

is Master, now lying in the Port of Hongkong and bound for the Port of "A," Tacoma or Seattle, Washington, U.S.A., which the Osaka Shosen Kaisha agrees to transport to the said Port of "A," Tacoma or Seattle, (with leave to tow or assist vessels in distress; to sail with or without pilot; to trans-ship to any other steamer, to warehouse or lighter from steamer to steamer, and from steamer to shore; and to touch at any port or ports in any rotation or order in or out of the customary route; and to call at any port or ports more than once), and there in like apparent good order and condition deliver the same to the Chicago, Milwaukee & St. Paul Railway Company, to be transported by the said Chicago, Milwaukee & St. Paul Railway Company, and their railway or steamship connection to the point of "B," Providence R I, there in like apparent good order and condition to be delivered unto consignee, or to his or their assigns, upon payment immediately upon discharge of the property of the freight charges thereon at the rate from Hongkong to Tacoma or Seattle, Wash., of (shown below) per 100 pounds gross weights and from Tacoma or Seattle, Wash., to Providence RI at the rate of (shown below) per 100 pounds gross weight, together with all advanced charges, if any, and all other charges and average, without any allowance of credit or discount, all payable at the Steamship Company's option in advance in local currency, the equivalent of United States Gold Coin, at current bank demand rate of exchange, or on delivery of the freight, in United States Gold Coin.

IT IS MUTUALLY AGREED as to each carrier of all or any of said property over all or any of said route to destination, and as to each party at any time interested in all or any of said property, that in consideration of the rates of freight herein named every service to be performed hereunder shall be subject to the conditions, whether printed or written herein contained (including conditions on back hereof,) all of which conditions as agreed to by the shipper and accepted for himself and his assigns as just and reasonable.

The surrender of this BILL of LADING properly endorsed shall be required before delivery of the property. Inspection of the property covered by the Bill of Lading will not be permitted unless provided by law, or unless permission is endorsed on this BILL of LADING, or given in writing by the shipper.

CONSIGNED TO Order of Messrs Heidelbach Ickelheimer & Co New York

DESTINED TO

NOTIFY Ultimate Consignees.

AT Care The American Dist. Steaming Co Providence R I

Marks and Numbers	Nos. of Packages	Description of Articles	Value
H [W] K 6871 6871 PROVIDENCE	200	Waste Silk	

* Agent issuing Bill of Lading must state whether figures shown are "Shippers" or "Carriers."

Shipper's Weight & measurement Commodity	Railway Measurement (Subject to further verification)	Weight	Steamship Rate and Charges Rate per 100 lbs G. $	Charges G. $	Inland Charges G. $	Total Charges G. $
Waste Silk	15 48/100	2400 lbs Wood	9.50	2681.25	479.50	3160.75
				@ Co. 33 5/8 %		1074.82

The Company reserves the right to dispose of or forward shippers' risk and expense goods not taken delivery of by the consignees before delivery. All Storage Charges, if any incurred at Seattle and/or Tacoma, to be paid by Consignees before delivery.

Charges are to be paid at Seattle &/or Tacoma

In case of failure to obtain railway connection this Company shall not be held responsible for any delay transshipment at Seattle &/or Tacoma.

Charges to be paid at destination to or via Seattle may be discharged at Tacoma at the Carrier's option.

RECEIVED $ in part payment of the charges on the property described herein

Freight Paid

RIVER FREIGHT CARED FOR BY SHIPPERS.

May be transhipped at Kobe at O. S. K. option

(Signature here acknowledges only the amount prepaid.)

IN WITNESS WHEREOF: The agent of the Osaka Shosen Kaisha, on behalf of that Company separately, and acting as agent of the Chicago, Milwaukee & St. Paul Railway Company and their rail and water connections jointly, hath affirmed to Three Bills of Lading excluding Captain's copy, all of this tenor and date, one of which Bills of Lading having been accomplished, the others to stand void.

DATED at Canton this 24th day of June 1918

For Master.

(On behalf of the Steamship Company separately, and of the Railway Carriers and their connections jointly).

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546

Not responsible for any consequence, direct or indirect, resulting from a state of war.

(A) With respect to the service until delivery at the Port of "A" Tacoma or Seattle Wash., first before mentioned, it is hereby agreed that the Steamship Company, or any vessel owned by or all of the property herein described shall not be liable for any loss thereof damage thereto, except as herein after provided.

1. The Steamship Company as owner of vessel in possession of the property shall not be liable for any loss thereof or damage thereto or delay caused by the acts of God, King's enemies, restraints of Government, letters of marque or reprisal, barratry, pirates, assailing thieves, arrest or seizure under legal process, quarantine, or the consequences of any attempt to avoid the same, or by fire, explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, or unseaworthiness of vessel when sailed, or by reason of inevitable accident, error of navigation or negligence of pilots, masters, mariners, engineers or any persons in the service of the Steamship Company, whether in navigating or otherwise, risk of craft, or transhipment, and each and all the dangers and accidents of the seas and of navigation generally of whatsoever nature or kind.

2. Prepaid freight can not be reclaimed, ship or goods lost or not lost, and the owners, or consignee shall pay the freight and all other lawful charges accruing on said property, and if required shall pay the same in advance. If upon inspection it is ascertained that the articles shipped are not those described in the Bill of Lading the freight charges must be paid upon the articles actually shipped.

3. In case any or all of the property described herein shall be prevented by any cause from being forwarded in its first steamship leaving after the arrival of such property at the port of shipment, the Steamship Company is only bound to forward such property according to the rates and subject to the rights in its favor, as if the property described herein were shipped by the Steamship Company at Seattle by any other steamer or steamers, either its own or that of other owners, at its option, and reshipment to be made at the risk of the property, the expense of such services, however, to be borne by the Steamship Company.

4. In case of any port or ports being interdicted by blockade or if the entering and or discharging of cargo in such port or ports shall be considered unsafe by reason of war or disturbance, the Master of the Steamship may discharge the property at any port intended or at any of those ports, at the nearest safe and available port, at his discretion, and at the risk and expense of the owner of the property; and the Steamship Company's responsibility shall cease when once the property shall have been so discharged into proper and safe keeping, the Master of the Steamship giving immediate notice of the disposition of the property to the consignee as far as can be ascertained.

5. In the event that any vessel in the service of the said Steamship Company shall put into a port of distress to the assistance of or carrying the property described in this Bill of Lading, putting the assisting vessel to salvage reward, or any remuneration for such service, such salvage or other remuneration shall be prepaid in the same manner as if the assisting vessel were in the service of another company, or person.

6. General Average shall be payable according to York-Antwerp Rules, 1890, and Antwerp Rule, 1892.

If the shipowners shall have exercised due diligence to make the steamer in all respects seaworthy and to have her properly manned, supplied, and outfitted, it is hereby agreed that in case of danger, damage or disaster, resulting from accident, or fault or errors in navigation, or in the management of the steamer, or from any latent or other defect in the steamer, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the defect or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, Consignees or Owners of the cargo, shall, nevertheless, pay salvage, and any special charges incurred in respect to the cargo, and shall contribute, with the shipowners in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril all with the same force and effect, and to the same extent, as if such accident, danger, damage or disaster had not resulted from, or been occasioned by faults or errors in navigation or in the management of vessel, or any latent or other defect or unseaworthiness.

7. The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any to the consignee including the freight charges, if paid) at the place and the time of shipment under this Bill of Lading, unless a lower value has been represented in writing by the shipper, or has been agreed upon, or is determined by the classification at tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

In any event it is expressly agreed that the Steamship Company shall not become liable for any value exceeding one hundred dollars ($100.00), United States Gold Coin, upon each of the packages described unless other value is inserted and so expressed in this Bill of Lading, and will not be responsible for gold, silver, precious stones, metals, jewelry, or treasure of any kind unless Bill of Lading in which the value is stated is signed thereby.

8. Any carrier or party liable on account of loss of, or damage to, any of the said property shall have the full benefit of any insurance that may have been effected upon, or on account of, said property.

9. Vessels of the Steamship Company are warranted seaworthy only so far as the care in the appointment or selection of agents, superintendents, pilots, Masters, officers, engineers, and crew can insure it, and the Steamship Company will not be liable for any loss or damage to the property described herein, arising directly or indirectly from latent defects in boilers machinery or any part of the vessel, provided all reasonable measures have been taken to insure efficiency.

10. All lighterage from steamer to steamer, and, or between steamers and shore of the property named in this Bill of Lading will be at the risk of the owner of such property.

11. In case of quarantine the property described herein may be discharged into depot, bulk, or other vessel as required for the steamship's dispatch, and quarantine expenses of whatever nature or kind upon the property shall be borne by the owner of same.

12. Property carried on deck solely at the owner's risk. Fish, fruits, vegetables, and all perishable goods, glass, crockery, or articles contained in glass or crockery or castings, or any articles of a fragile nature, are accepted by the Steamship Company entirely at the risk of the owner of the property.

13. All liners, and expenses and loss by detention of the vessel or carrier caused by incorrect markings, or by incomplete or incorrect description of contents, or lack of other particulars required by the authorities at any stage of the transit shall be borne by the owners of such property.

14. Any property of an explosive, inflammable, damaging or dangerous nature shipped without being previously declared, and especially arranged for, is liable upon discovery to be thrown overboard or otherwise destroyed and the loss of same shall be borne by the shipper or owners of such property, who will further more be held responsible for all consequent loss or damages resulting from shipment of same, or expense incurred in connection therewith.

15. The Steamship Company shall not be accountable or responsible for weights, or for loss or damage resulting through the obliteration of marks or numbers, or from insufficiency of address, or caused by other cargo in contact with or near it, when property stowed, or for loss or damage to the property described occasioned by fire from any cause whatever, or for loss of any property, covered by bad or insufficient baling coverage or packing.

16. There shall be likewise borne exclusively by the shippers, owner, or consignee of the property described in the Bill of Lading the risk of loading and discharging, any on shore or afloat in case of customs in the quarantine station, on the quay, in a public or private warehouse, or elsewhere, and all transfer or transport to another vessel in case of transhipment, of whatsoever nature or kind in every direction, and the property shall be at the risk of the consignee, and all risk and expense attending on account of delay, warehousing or any other cause whatsoever, prior to delivery of the cargo mentioned in this Bill of Lading on the ship's tackles of the Steamship Company.

17. It is further understood that the property covered by this Bill of Lading subject to all conditions expressed in the approved forms of Bills of Lading, Rules and regulations in use by the said Steamship Company at the time of shipment.

18. The Steamship Company is not liable for loss, delay or injury to the property after the same has been delivered to the Agent of the Company at the port of destination Tacoma or Seattle

PLEASE DELIVER TO

OR ORDER

(B) With respect to the service after delivery at the Port of "A" Tacoma or Seattle, that before or at the time of delivery and until delivery at the Point "B" second hereinmentioned, it is agreed that:—

1. No carrier or party in possession of the property herein described shall be liable for any loss thereof, or damage thereto, or delay caused by the act of God, the Public Enemy, Quarantine, the authority of law, or the act or default of the shipper or owner, or for interference in any form by customs officers or any matter or thing beyond the control of the carrier or any person having possession of the property, whether like or unlike that hereinbefore mentioned, it is agreed that:—

2. Except in the case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage or delay occurring while the property described herein is stopped and held in transit upon request of the shipper, owner of party entitled to make such request or resulting from a defect or vice in the property, or from like of loss or accident.

3. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property in transportation on cars the carrier or party in possession except in the case of loss or damage by fire, in which case the liability shall be the same as though the property has been carried in closed cars, shall be liable only for its negligence, and the burden to prove freedom from such negligence shall be on the carriers or party in possession.

4. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular train or vessel, or otherwise than with reasonable despatch. The rail carriers herein shall have the right in case of physical necessity to forward said property by any railroad or route between the Port of "A" Tacoma or Seattle, and the Point to which the rate is given, but if such diversion shall be from a rail to a water carriage the same shall be at the same as though the entire carriage were by rail.

5. No carrier shall be liable for loss, damage, or injury not occurring on its road, or property of the through route, or after said property has been delivered to the next carrier except such liability as may be imposed by law.

6. The amount of any loss or damage or which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if paid) at the place and time of shipment under this Bill of Lading, unless a lower value has been represented in writing by the shipper, or has been agreed upon, or is determined by the classification or tariffs, upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

7. Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

8. Any carrier or party liable on account of loss of or damage to any of said property shall, by right of subrogation, have the full benefit of any insurance that may have been effected upon or on account of said property.

9. All property shall be subject to the necessary cooperage and baling at owner's cost.

10. Property destined to a station, wharf, or landing where there is no regularly appointed agent shall be entirely at the risk of the owner after being unloaded from the cars or vessels, and when delivered on private or other sidings, wharves, or landings shall be at the owner's risk after the cars are detached from the trains.

11. No carrier will carry or be liable for any money, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless special agreement to do so and a stipulated value of the articles are inserted hereon.

12. Every party, whether principal or agent, shipping explosives or dangerous goods without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense, or destroyed with no compensation.

13. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and if required shall pay the same before delivery. If, upon inspection, it is ascertained that the articles shipped are not those described in this Bill of Lading the freight charges must be paid upon the articles actually shipped.

14. Except in case of failure from a rail to a water carriage, or partly a water carriage, or all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations and exemptions provided by statute and to the conditions contained in this Bill of Lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defects in hulk, machinery or appurtenances or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at the intermediate ports, to tow and be towed, assist vessels in distress, and deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage across the rivers or in lakes or other harbours and the liability for such lighterage shall be governed by the other sections of this instrument.

15. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot or place of delivery of the carrier, or warehouse subject to a reasonable charge for storage and to carriers responsibility as warehouseman only or may be at the option of the carrier removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for freight and all other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (inclusive of legal holidays) for loading or unloading, and may add such charge to all other charge hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rules affecting car service or storage.

This Bill of Lading is issued subject to the terms and conditions of the Act of Congress of the United States of America, relating to the Navigation, etc., approved on the 13th day of February, 1893.

Any alteration, addition to, or erasure from this Bill of Lading which shall be made without an endorsement thereof hereon, signed by the agent of the carrier issuing this Bill of Lading shall be without effect, and this Bill of Lading shall be enforceable according to its original tenor.

Two copies of this Bill of Lading duly endorsed, must be sent to the consignee, to effect the customhouse entry and delivery of the goods.

F. D. MONCKTON,
CLERK.

MAR 20 1922
FILED
FOR THE NINTH CIRCUIT
UNITED STATES CIRCUIT COURT OF APPEALS

3845

Case #2905
Def's Ex. #4-a

A No 1.

Bill of Lading No. 8

OSAKA SHOSEN KAISHA, L'D.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.,

(In connection with other carriers on the route to destination)

THROUGH TRANS-PACIFIC & OVERLAND BILL OF LADING.

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Bill of Lading at Canton

on June 19 18 from Hong Kong China

the property described below, in apparent good order and condition except as noted, (contents and condition of contents unknown), marked, consigned and destined as indicated below for shipment on board the steamship Canada Maru whereof

is Master, now lying in the Port of Hong Kong and bound for the Port of "A," Tacoma or Seattle, Washington, U.S.A., which the Osaka Shosen Kaisha agrees to transport to the said Port of "A," Tacoma or Seattle, (with leave to tow or assist vessels in distress; to sail with or without pilot; to trans-ship to any other steamer, to warehouse or lighter from steamer to steamer, and from steamer to shore; and to touch at any port or ports in any rotation or order in or out of the customary route; and to call at any port or ports more than once), and there in like apparent good order and condition deliver the same to the Chicago, Milwaukee & St. Paul Railway Company, to be transported by the said Chicago, Milwaukee & St. Paul Railway Company, and their railway or steamship connection to the point of Providence R I

"B," , there in like apparent good order and condition to be delivered unto consignee, or to his or their assigns, upon payment immediately upon discharge of the property of the freight charges thereon at the rate from Hong Kong to Tacoma or Seattle, Wash., of (shown below) per ton pounds gross weights and from Tacoma or Seattle, Wash., to Providence R I as the rate of (shown below) per ton pounds gross weight, together with all advanced charges, if any, and all other charges and average, without any allowance of credit or discount, all payable at the Steamship Company's option in advance in local currency, the equivalent of United States Gold Coin, at current bank demand rate of exchange, or on delivery of the freight, in United States Gold Coin.

May be transhipped at

IT IS MUTUALLY AGREED as to each carrier of all or any of said property over all or any of said route to destination, and as to each time interested in all or any of said property, that in consideration of the rates of freight herein named every service to be performed hereunder shall be subject to the conditions, whether printed or written herein contained (including conditions on back hereof), all of which conditions as agreed to by the Shipper and accepted or implied for himself and his assigns as just and reasonable.

The surrender of this BILL OF LADING properly endorsed shall be required before delivery of the property. Inspection of the property covered by the Bill of Lading will not be permitted unless provided by law, or unless permission is endorsed on this BILL OF LADING, or given in writing by the shipper.

CONSIGNED TO Order of Messrs Meidelbach Ickelheimer & Co

DESTINED TO Ultimate Consignees

NOTIFY

AT The American Sicks Stimming Co Providence R I

Marks and Numbers	Nos. of Packages	Description of Articles	Value
5572			
S (W) O 5571	100	Waste Silk	
PROVIDENCE			
		Weight & measurement	

The Company reserves the right to dispose of or carry back the goods at shipper's risk and expense in case of any interruption or refusal by the Consignee to receive the same at any stage of transit.

* Agent Issuing Bill of Lading must state whether figures shown are "Shippers" or "Carriers."

Commodity	* Measurements (Subject to Correction)	* Weight (Subject to Correction)	Steamship Rate and Charges Rate G. $	Steamship Rate and Charges Charges G. $	Total Rate and Charges Rate per Ton G. $	Total Rate and Charges Charges G. $	Total Charges G. $
Waste Silk	1567.29	11.00	300	33.00	1.25	13.75	46.75
Total.							

Ex. 11.8 m $ 25.12

All Storage Charges, if any incurred at Seattle and/or Tacoma, to be paid by Consignees before delivery.

Goods destined to or via Seattle may be shipped at Tacoma at the Carriers' option

Owing to railway congestion the Company shall not be held responsible for any delay in transhipment at Seattle and/or Tacoma.

If charges are to be prepaid, write or stamp here, "To be prepaid" RIVER FREIGHT CARED FOR BY SHIPPERS

RECEIVED $ to apply in prepayment of the charges on the property described hereon

Freight Paid (Signature here acknowledges only the amount prepaid)

Railway Rates subject to further payment by consignees in case of advance.

IN WITNESS WHEREOF, The Agent of the Osaka Shosen Kaisha, on behalf of that Company separately, and acting as agents of the Chicago, Milwaukee & St. Paul Railway Company and their rail and water connections jointly, hath affirmed to Blue Bills of Lading excluding Captain's copy, all of this tenor and date, one of which Bills of Lading having been accomplished, the others to stand void,

DATED at Canton this 21st day of June 1918

Master.

Not responsible for any consequence, direct or indirect, resulting from delay.

(On behalf of the Steamship Company separately, and of the Railway Carriers and their connections jointly).

1658/9

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PLEASE DELIVER TO

(B) With respect to the carriage of the Goods by the Port "A" [illegible] before mentioned, and until delivery at the Port "B" [illegible] before mentioned, it is agreed that:—

1. No carrier or party in possession of the Goods described shall be liable for any loss thereof, or damage thereto, or delay caused by the act of God, the Public Enemy, Quarantine, the authority of law, or the act or default of the shipper, or owner, or for differences in the weights of grain, seed, or pulse, or the natural shrinkage in excess of one per cent., or for any of the following causes or consequences in whatever way arising:—
2. Except in the case of negligence by the carrier or party in possession (and the burden of proving negligence shall be on the carrier or party in possession) the carrier or party in possession shall not be liable for loss, damage or delay occurring while the property described herein is stopped and held in transit upon request of the shipper, owner or agent, or resulting from a defect or vice in the property, or from the act or default of the shipper, owner or agent.
3. When the service is performed with refrigerator cars, on account of the nature of the property, or when at the request of the shipper the property is loaded in open cars, the carrier or party in possession (except in the case of loss or damage by fire, in which case the liability shall be the same as though the property has been carried in closed cars), shall be liable only for its negligence, and the burden to prove freedom from such negligence shall be on the carriers or party in possession.
4. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable despatch. The rail carriers herein shall have the right in case of physical necessity to forward said property by any railroad or route between the Port of "A," Tacoma or Seattle, and the Points to which the same is consigned, but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.
5. No carrier shall be liable for loss, damage, or injury occurring on its own road, or on a portion of the through route, or after said property has been delivered to the next carrier except such liability as may be imposed by law.
6. The amount of any loss or damage on which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid), at the place and time of shipment under this Bill of Lading, unless a lower value has been represented in writing by the shipper, or has been agreed upon or otherwise ascertained by the classification or tariffs, upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.
7. Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.
8. Any carrier or party liable on account of loss or of damage to any of said property shall, by right of subrogation, have the full benefit of any insurance that may have been effected upon or on account of said property.
9. All property shall be subject to necessary cooperage and bailing at owner's cost.
10. Property destined to a station, wharf, or landing where there is no regularly appointed agent shall be entirely at the risk of the owner after being unloaded from the cars or vessels, and when delivered on private or other sidings, wharves, or landings shall be at the owner's risk after the cars are detached from the trains.
11. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extra-ordinary value not specifically rated in the published classification or tariffs, unless special agreement to do so and a stipulated value of the articles are inserted hereon.
12. Every agent, whether principal or agent, shipping explosive or dangerous goods without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense, or destroyed without compensation.
13. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and if required shall pay the same before delivery. If, upon inspection, it is ascertained that the articles shipped are not those described in this Bill of Lading, the freight charges must be paid upon the articles actually shipped.
14. Except in case of diversion from a rail to a water route, which is provided for in Section 4 hereof, if on all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations and exemptions provided by statute and to the conditions contained in this Bill of Lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosions, bursting of boilers, breaks of shafts, or any latent defects in hulls, machinery, appurtenances, or from collision, stranding, or other accidents of navigation, or from deviation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at the intermediate ports, to tow and be towed, assist vessels in distress, and deviate for the purpose of saving life or property.
15. The term "water carriage" in this section shall not be required to [illegible] the carriage over the lakes or other waters, and the liability for such lighterage shall be governed by the other sections of this instrument.
16. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot or place of delivery of the carrier, or warehouse subject to a reasonable charge for storage and to carriers responsibility as warehousemen only, or may be, as the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.
17. The carrier will make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (inclusive of legal holidays) for loading or unloading, and may add such charge to all other charge hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any special rules affecting car service or storage.

This Bill of Lading is issued subject to the terms and conditions of the Act of Congress of the United States of America, relating to the Navigation, etc., approved on the 13th day of February, 1893.

Any alteration, addition to, or erasure from this Bill of Lading which shall be made without an endorsement thereof hereon, signed by the agent of the carrier issuing this Bill of Lading shall be without effect, and this Bill of Lading shall be enforceable according to its original tenor.

Two copies of this Bill of Lading duly endorsed, must be sent to the consignee, to effect the customhouse entry and delivery of the goods.

F. D. MONCKTON,
CLERK.

FILED
MAR 20 1922
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

3843

Canton #2905 5-a One piece

Issue N° 68761.

A No 1.

Bill of Lading No. 11

OSAKA SHOSEN KAISHA, L'D.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.,

(In connection with other carriers on the route to destination)

THROUGH TRANS-PACIFIC & OVERLAND BILL OF LADING.

RECEIVED subject to the classifications and tariffs in effect on the date of issue of this Bill of Lading at Canton

on 24th June 1918 from Hoogkwangsia (Co.)

the property described below, in apparent good order and condition except as noted, (contents and condition of contents unknown), marked, consigned and destined as indicated below for shipment on board steamship "Canada Maru" whereof

is Master, now lying in the Port of Hongkong and bound for the Port of "A," Tacoma or Seattle, Washington, U.S.A., which the Osaka Shosen Kaisha agrees to transport to the said Port of "A," Tacoma or Seattle, (with leave to tow or assist vessels in distress; to sail with or without pilot; to trans-ship to any other steamer, to warehouse or lighter from steamer to steamer, and from steamer to shore; and to touch at any port or ports in any rotation or order in or out of the customary route; and to call at any port or ports more than once), and there in like apparent good order and condition deliver the same to the Chicago, Milwaukee & St. Paul Railway Company, to be transported by the said Chicago, Milwaukee & St. Paul Railway Company, and their railway or steamship connection to the point of "B," Providence, R.I., there in like apparent good order and condition to be delivered unto consignee, or to his or their assigns, upon payment immediately upon discharge of the property of the freight charges thereon, at the rate from Hongkong to Tacoma or Seattle, Wash., of shown below) per 100 pounds gross weights and from Tacoma or Seattle, Wash., to Providence R.I. at the rate of (shown below) per 100 pounds gross weight, together with all advanced charges, if any, and all other charges and average, without any allowance of credit or discount, all payable at the Steamship Company's option in advance in local currency, the equivalent of United States Gold Coin, at current bank demand rate of exchange, or on delivery of the freight, in United States Gold Coin.

IT IS MUTUALLY AGREED as to each carrier of all or any of said property over all or any of said route to destination, and as to each party at any time interested in all or any of said property, that in consideration of the rates of freight herein named every service to be performed hereunder shall be subject to the conditions, whether printed or written herein contained (including conditions on back hereof,) all of which conditions as agreed to by the shipper and accepted for himself and his assigns as just and reasonable.

The surrender of this BILL of LADING properly endorsed shall be required before delivery of the property. Inspection of the property covered by the Bill of Lading will not be permitted unless provided by law, or unless permission is endorsed on this BILL of LADING, or given in writing by the shipper.

CONSIGNED TO Order of Messrs Goldman Sachs & Co New York

DESTINED TO Ultimate Consignee:

NOTIFY

AT The American Brick Manufacturing Co. Providence R.I.

Marks and Numbers	Nos. of Packages	Description of Articles	Value
H [W] K 6071 6911 PROVIDENCE	300	Waste Silk	

* Agent issuing Bill of Lading must state whether firm shown are "Shippers" or "Carriers."

Commodity	* Measurements	Rates subject to further agreement between Railway Companies and shippers in case of commercial advancement	Steamship Rate and Charges: Rate per ton of G. $	Steamship Rate and Charges: Charges	Company reserves the right to dispose of or carry on the goods at shipper's risk and expense should the junction of the Railway Companies or the Authorities at destination refuse to receive the same.	Inland Rate from Tacoma or Seattle to Destination G. $	Total Charges G. $
Waste Silk	118 31/100	111 00	9 00	99 99	17	19 12	208 11
						(C & C) 11 x 47	5 17 6

Shipper's weight & measurement

All Storage Charges, if any incurred at Seattle and/or Tacoma, to be paid by Consignee before delivery.

Owing to railway congestion this Company shall not be held responsible for any delay in transhipment at Seattle and/or Tacoma

Goods destined to or via Seattle may be discharged at Tacoma at the Carriers option

May be transhipped at Kobe at O. S. K. option

RIVER FREIGHT CARED FOR BY SHIPPERS

Charges for transhipment, if any, to be paid by Consignee before delivery.

In witness whereof, the agent of the Osaka Shosen Kaisha, on behalf of that Company separately, and acting as agent of the Chicago, Milwaukee & St. Paul Railway Company and their rail and water connections jointly, hath affirmed to Five Bills of Lading excluding Captain's copy, all of this tenor and date, one of which Bills of Lading having been accomplished, the others to stand void.

RECEIVED $ to apply in prepayment of the charges on the property described herein.

Agent.

(signature here acknowledges only the amount prepaid)

Freight Paid

DATED at Canton this 24th day of June 1918

For Master.

(On behalf of the Steamship Company separately, and of the Railway Carriers and their connections jointly).

Not responsible for any consequence, direct or indirect, resulting from acts of war.

1261

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(B) With respect to the service after delivery of the property before which is provided and until delivery at the port of second service mentioned, it is agreed that:—

1. No carrier or party in possession of the property herein described shall be liable for any loss thereof or damage thereto, or delay caused by the act of God, the Public Enemy, Quarantine, the authority of law, or the act or default of the shipper, or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or differences in elevator weights.

2. Except in the case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), no carrier or party in possession shall not be liable for loss, damage or delay occurring while the property described herein is stopped and held in transit upon request of the shipper, owner of party entitled to make such request; or resulting from a defect or vice in the property, or from the risks of strikes.

3. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars the carrier or party in possession (except in the case of loss or damage by fire, or to a public use case the liability shall be the same as though the property has been carried in closed cars), shall be liable only for its negligence, and the burden to prove freedom from such negligence shall be on the carriers or party in possession.

4. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable despatch. The rail carriers hereto shall have the right in case of physical necessity to forward said property by any railroad or railroads between the Port of "A," Tacoma or Seattle, and the Point to which the rate is given, but if such diversion shall be from a rail to such route the liability of the carrier shall be the same as though the entire carriage were by rail.

5. No carrier shall be liable for loss, damage, or injury not occurring on its own road, or its portion of the through route, after said property has been delivered to the next carrier except such liability as may be imposed by law.

6. The amount of any loss or damage or which any carrier is liable shall be computed on the basis of the value of the property (being the basis and invoice price, if any, to the consignee, including the freight charges, if prepaid), at the place and time of shipment under this Bill of Lading, unless a lower value has been represented in writing by the shipper, or has been agreed upon or is determined by the classification or tariffs, upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

7. Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery then within four months after a reasonable time for delivery has elasped. Unless claims are so made the carrier shall not be liable.

8. Any carrier or party liable on account of loss of or damage to any of said property shall, by right of subrogation, have the full benefit of any insurance that may have been effected upon or on account of said property.

9. All property shall be subject to the necessary cooperage and baling at owner's cost.

10. Property destined to a station, wharf, or landing where there is no regularly appointed agent shall be entirely at the risk of the owner after being unloaded from the cars or vessels, and when delivered on private or other sidings, wharves, or landings shall be at the owner's risk after the cars are detached from the trains.

11. No carrier will carry goods liable in any way for any documents, specie, or for any articles of extra-ordinary value not specifically rated in the published classification or tariffs, unless special agreement to do so and a stipulated value of the articles are indorsed hereon.

12. Every party, whether principal or agent, shipping explosive or dangerous goods without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at risk and expense, or destroyed without compensation.

13. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and if required shall pay the same before delivery. If, upon inspection, it is ascertained that the articles shipped are not those described in this Bill of Lading the freight charges must be paid upon the articles actually shipped.

14. Except in case of diversion from a rail to a water route, which is provided for in section 4 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations and exemptions provided by statute and to the conditions contained in this Bill of Lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defects in hulk, machinery or appurtenances; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at the intermediate ports, to tow and be towed, assist vessels in distress, and deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage across the rivers or in lakes or other harbours and the liability for such lighterage shall be governed by the other sections of this instrument.

15. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent, or given may be kept in car, depot or place of delivery of the carrier, or warehouse subject to a reasonable charge for storage and to carriers responsibility as warehousemen only; or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (inclusive of legal holidays) for loading or unloading, and may add such charge to all other charge hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rules affecting car service or storage.

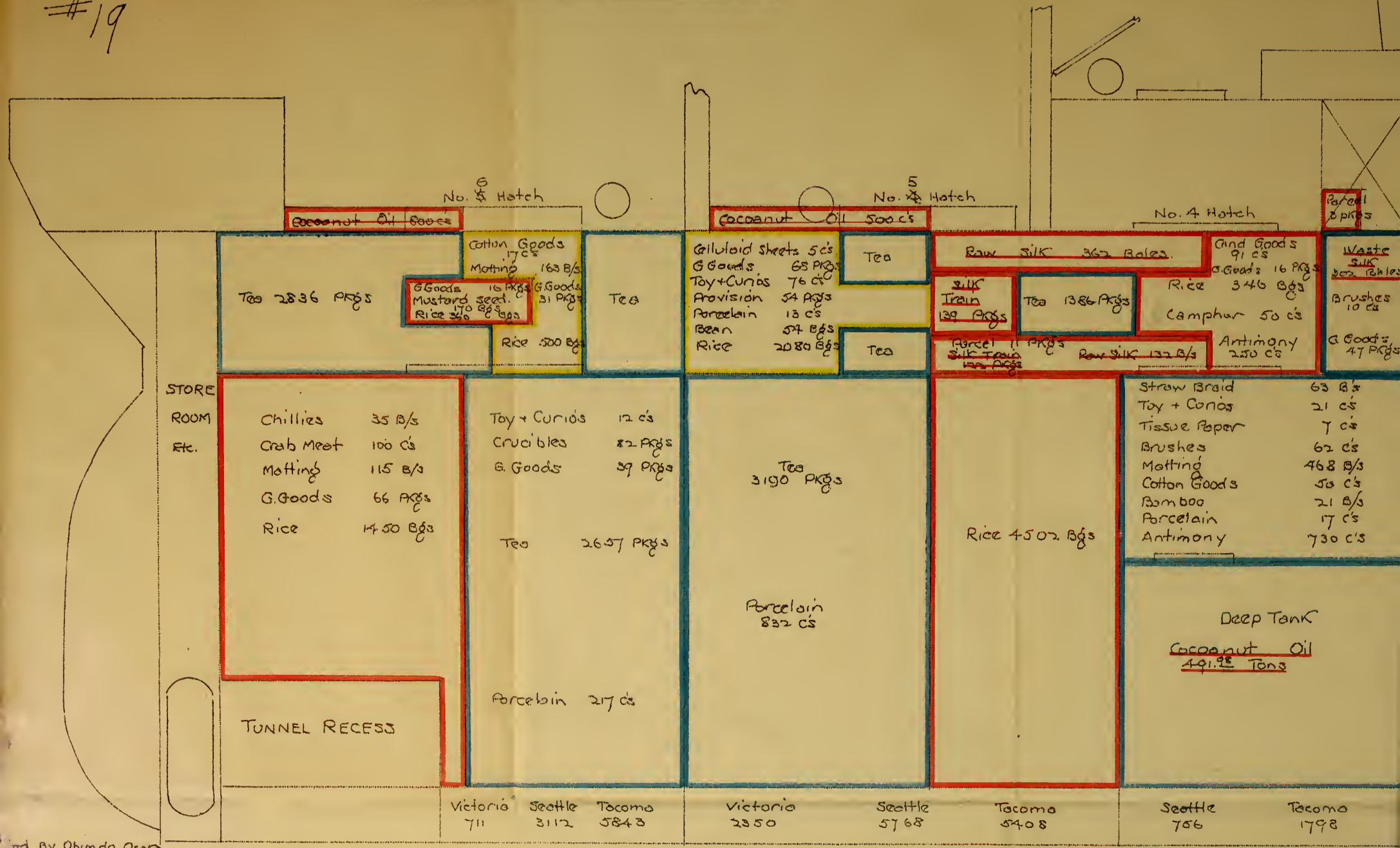
This Bill of Lading is issued subject to the terms and conditions of the Act of Congress of the United States of America, relating to the Navigation, etc., approved on the 13th day of February, 1893.

Any alteration, addition to, or erasure from this Bill of Lading which shall be made without an endorsement thereof hereon, signed by the agent of the carrier issuing this Bill of Lading shall be without effect, and this Bill of Lading shall be enforceable according to its original tenor.

Two copies of this Bill of Lading duly endorsed, must be sent to the consignee, to effect the customhouse entry and delivery of the goods.

STOWAGE PLAN

#19



ed By Obundo Osaro

S.S. "CANADA MARU." VOY. NO. 32 E.B.

Victoria	10023 Pkgs	641.49 tons
Seattle	30421 Pkgs	2714.63 Tons
Tacoma	26555 Pkgs	3391.82 Tons
Total	66999 Pkgs	6747.94 Tons

Glassware 13 c's | Porcelain 15 c's | Rice 2525 Bgs

Toys & Curios 55 c's | Silk Goods 37 c's, Cotton Goods 39 c's, G Goods 35 pkgs | Soy & Misc 215 c's

Bamboo 6 Bs. | Selphate 41 c's | Provision 80 pkgs

No. 3 Hatch.

Parcel 2 pkgs

No. 2 Hatch.

Polishing Sand 24 c's

No. 1 Hatch

Cocoanut Oil 700 c's

Waste Silk 300 Bales

Brushes 10 c's

G. Goods 47 pkgs

63 B's
21 c's
7 c's
62 c's
468 B's
50 c's
21 B's
17 c's
730 c's

Wood Oil 500 c's

Beans 15 Bgs | G. Goods 26 pkgs | Soy & Misc 320 c's

Manganese 464 Bgs

Antimony 500 c's

Wood Oil 500 c's

Raw Silk

Rice 1300 Bgs

Raw Silk

Raw Silk 932 B's

Silk Goods 55 c's | Silk Train 13 pkgs

Beans 460 Bgs

Rice 560 Bgs | G. Goods 3 pkgs

Raw Silk

Sugar 11 c's

Silk Train 14 c's | Tea 663 Pkgs

Rice 2000 Bgs

Crews

Tobacco 402 B/s

Mustard Seed 430 Bgs

Bean 948 Bgs

Rice 360 Bgs

Raw Silk 872 Bales

Tea 315 Pkgs
Peas 80 Bgs
Antimony 500 c's

Tea 3114 Pkgs

ENGINE, Boiler and Bunker

G. Goods	83 Pkgs
Camphor	100 c's
Matting	275 B/s
Monthol Crystal	50 c's
Comomile Flour	46 c's
Bean	1133 Bgs
Mustard Seed	15 Bgs
Brushes	37 c's
Toy & Curios	28 c's
Hemp Braid	51 B/s
Straw Braid	20 B/s
Waste Silk	54 B/s
Tissue Paper	70 c's
Porcelain	221 c's
Sheep Wool	200 B/s

Rice 5565 Bgs

Tea 4034 Pkgs

Porcelain 699 c's

Waste Silk 948 B/s

Matting 200 B/s

Wolframite 678 Bgs

Peas 94 Bgs

Mustard Seed 160 Bgs

Beans 2462 Bgs

Rice 3670 Bgs

FORE PEAK TANK

Victoria	Seattle	Tacoma	Victoria	Seattle	Tacoma	Victoria	Seattle	Tacoma
3210	4027	2413	1089	8745	5733	2663	8013	5360

Reduced to 1/3 size.

549

FORM NO A. 29

OSAKA SHOSEN KAISHA
(THE OSAKA MERCANTILE S S CO. LTD)
HEAD OFFICE, OSAKA, JAPAN
S. HASHIMOTO
MANAGER
CABLE ADDRESS
SHOSEN TACOMA
CODES
BENTLEYS
SCOTTS 10TH ED
A B C 5TH ED TION
WESTERN UNION 5 LETTER
EDITION
TELEPHONE
MAIN 1249

TACOMA, U.S.A.

O.S.K. OFFICE RECORD CANADA MARU VOYAGE 32--1918

ARRIVED	DATE & TIME	SAILED DATE & TIME	CAPTAIN	DESTINATION
CAPE FLATTERY	7/30 9:30 AM		Ship.CAPT.	ESQUIMALT
ESQUIMALT	8/6 2 P.M.	8/6 P.M.	GRANT	TODD DRYDOCK
TODDS	8/7 A. M.	8/10 A.M.	CALL	MIL.DOCK #1
MIL. DOCK #1	8/10 9 A.M.	8/10 2 P.M.	WINTZ	TODD DRYDOCK
TODD D. DOCK	8/10 3 P.M.	8/11 7:30 PM	GRANT	MIL.DOCK #1
MIL.DOCK #1	8/11 8:30 PM	9/3 5:15 A.M.	GRANT	COAL BUNKERS
COAL BUNKERS	9/3 5:50 AM	9/3 5:40 P.M.	GRANT	MIL.DK. #2
MIL. DOCK #2	9/3 7:35 PM	9/4 4:30 A.M.	GRANT	ESQUIMALT
ESQUIMALT	9/4 1 P.M.	1919 1/12 10:17 PM	GRANT	COAL BUNKERS
COAL BUNKERS	1/13 7:30 A.M.	1/13 P. M.	RUGER	MIL.DOCK #2
MIL. DOCK #2	1/13 P. M.	1/20 6:10 PM	GRANT	PIER #6
PIER #6	1/20 9:30 P.M.	1/21 11 A.M.	GRANT	BOUND FOR YOKOHAMA

STEAMER WRECKED ON CAPE FLATTERY 7/30/18 9:30 A.M.

I, J. B. VAN FOSSEN, do hereby certify that the above is true and correct copy of the records kept in the Tacoma office of the Osaka Shosen Kaisha of the movements of the above steamer, Canada Maru voyage 32, after having been wrecked on Cape Flattery July 30, 1918.

J B Van Fossen
Chief Clerk

CASE NO. 2905
Defendant's EXHIBIT 20
UNITED STATES DISTRICT COURT
Western Dist. of Washington.
Elw. Silk Spinning Co
Director General of Railroads
FILED 10/27 1921
CLERK

3845
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
MAR 20 1922
F. D. MONCKTON,
CLERK.

22 Sam Quit 1921

550

BALFOUR, GUTHRIE & CO. SEATTLE, WASH.

COPY

Depts Ex. 21

C. M. & St. P. R. R.
CLAIM NO
386533
FREIGHT CLAIM DEPT

Seattle, Wash.,
August 26, 1918.

Messrs. Balfour, Guthrie & Co.,
Lloyd's Agents,
Seattle, Wash.

Dear Sirs,

As requested I went over to Tacoma to Chicago Milwaukee Dock and inspected wet and damaged bales of Waste Silk, said to be discharged from the "CANADA MARU", marked

S O W Providence	300	bales.
"	200	"
H ▭ ▭ K	192	"
"	175	"
H S ◇ O K	250	"

No. 3845
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
MAR 20 1922
F. D. MONCKTON.
CLERK.

On examination of same I found the bales in a very wet soaky condition, quite warm and heating, so much so some of them were quite hot. These were piled three high outside in the open air, so if the stuff will heat from being piled in this way what would it do if it was loaded and piled in a closed car; therefore, it is my opinion there is a great risk in shipping this in the condition it is in.

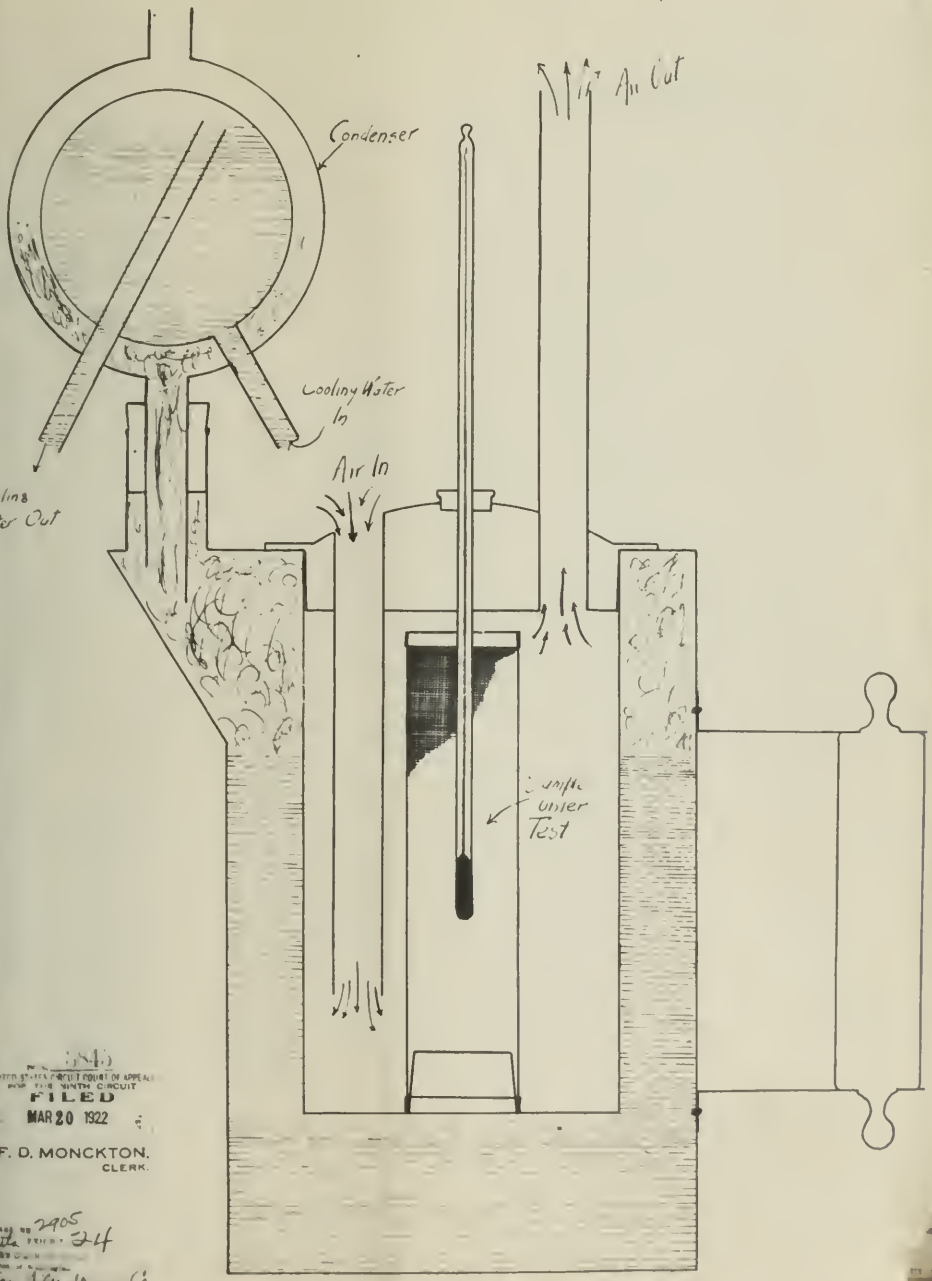
Yours faithfully,

CARGO SURVEYOR, LLOYD'S AGENTS.

CASE NO. 2905
Depts EXHIBIT 2-1
UNITED STATES DISTRICT COURT
Western Dist. of Washington.
Am. Silk Spinning Co.
vs. Director General etc
FILED Oct. 29 1921
By
Clerk

DESK
13

551



Mackey Cloth-Oil Tester.

Scale Full S

Monthly - 6 (CARGO.)

#28

By the Atlantic Mutual Insurance Company. [No. 23501]

American Silk Spinning Co. (Providence, R. I.)

386060

American Silk Spinning Co.

ON ACCOUNT OF Themselves except goods purchased and shipped under Letters of Credit issued by Brown Bros. & Co. and Watjen Toel & Co. from time to time now insured under other policies with this Co. and said shipments are not to apply to nor be insured by this policy

CASE NO. 1405 EXHIBIT 28
UNITED STATES DISTRICT COURT
Western Dist. of Washington
Am. Silk Spinning Co.
vs.
Aviation Mut. Ins. Co.
FILED 10/21 1921

Port or ports in the United Kingdom of Great Britain and Ireland direct or via a port in the same Kingdom for transhipment. Port or ports on the Continent of Europe between Hamburg and Triste inclusive, direct or by steamers only via a port in Germany Belgium, France, Italy or Great Britain for transhipment.

To New York or Boston with liberty to tranship one or more times, and at and thence by railroad &/or steamer to Providence, R. I.

On Goods; principally Silk Waste, Machinery and Card Clothing

Railroad and Vessel or Vessels upon all kinds of lawful goods and merchandises, laden or to be laden on board the good Sailing on and after April 20, 1909.

wherever she shall go for master to the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

Sum Insured, $ 100,000.

Beginning the adventure upon the said goods and merchandises, from and immediately following the loading thereof on board of the said vessel, at as aforesaid, and so shall continue and endure until the said goods and merchandises shall be safely landed at as aforesaid. AND it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to this insurance. The said goods and merchandises, hereby insured, are valued (premium included) at The cost of the goods at the place of shipment converted into United States currency at the rate of $5.50 the £ stlg. 45¢ the Florin, 23¢ the Franc, 23¢ the Lira, 23¢ the Austrian Crown, 28¢ the Mark.

Touching the adventures and perils which the said **Atlantic Mutual Insurance Company** is contented to bear, and take upon itself in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detainments of all kings, princes or people of what nation, condition or quality soever, barratry of the master and mariners, and all other perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof. AND in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, factors, servants and assigns of any one, labor and travel for, in and about the defence, safeguard and recovery of the said goods and merchandises or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof, the said Insurance Company will contribute according to the rate and quantity of the sum herein insured, having been paid a consideration for this insurance, by the assured or assigns, at and after the rate of Premium to be adjusted per cent. on the subscribed amount of this policy on vessel. The Company to be and payable monthly entitled to premium on all shipments herein provided for. The rates of premium shall be fixed by the President or the Vice President of the Company at the time of the risk are known and understood. It is warranted by the assured to report every shipment on the day of receiving advice thereof or as soon thereafter as practicable.

To cover all shipments, as above described, made by [illegible] whether the aggregate sum exceed the amount of subscription hereon or not—the premium on the excess of such subscription to be paid from time to time as soon as the amount of the same shall be known to the assured. But this Insurance is not to cover more than $250,000 any one vessel, subject to the Policy on any one vessel, or against the assured for any one loss.

Premium $ *

Other parts of liberty to cancel this [illegible] days notice of such cancellation

And in case of loss, such loss to be paid to thirty days after proof of loss and proof of interest in the said (the amount of the Note given for the premium, if unpaid, being first deducted), but no partial loss or particular average shall in any case be paid, unless amounting to five per cent. PROVIDED ALWAYS, and it is hereby further agreed, That if the said assured shall have made any other assurance upon the premises aforesaid, prior by day of date to this policy, then the said ATLANTIC MUTUAL INSURANCE COMPANY shall be answerable only for so much as the amount of such prior assurance may be deficient less or for fully covering the premium hereby assured; and the said ATLANTIC MUTUAL INSURANCE COMPANY shall return the premium upon so much of the sum by them assured, as they shall be by such prior assurance exempted from. AND in case of any insurance upon the said premises, subsequent in day of date to this policy, the said ATLANTIC MUTUAL INSURANCE COMPANY shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. Other insurance upon the premises aforesaid, of date the same day as this policy, shall be deemed simultaneous herewith; and the said ATLANTIC MUTUAL INSURANCE COMPANY shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance. IT IS ALSO AGREED, that the property be warranted by the assured free from any charge, damage or loss, which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade or any trade in articles contraband of war.

Warranted not to abandon in case of capture, seizure, or detention, until after condemnation of the property insured; nor until ninety days after notice of said condemnation is given to this Company. Also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention or blockade; but in the event of blockade, to be at liberty to proceed to an open port and there end the voyage.

In witness whereof, the President or Vice-President of the said **Atlantic Mutual Insurance Company** hath hereunto subscribed his name, and the one hundred and one thousand nine hundred and nine. the same to be attested by their Secretary, in New-York, the 22nd day of April

Memorandum. It is also agreed, that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, cordage, cannon, wicker ware and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits, (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging, and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and canes, except to bonze, free from average under twenty per cent. unless general; and sugar, flax, flax-seed and bread, are warranted by the assured free from average under seven per cent. unless general, and coffee in bags or bulk, pepper in bags or bulk, and rice, free from average, under ten per cent., unless general.

Warranted by the insured free from damage or injury, from dampness, change of flavor, or being spotted, chawdered, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils. In case of partial loss by sea damage to dry goods, cutlery or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise so far as practicable. Not liable for leakage on molasses or other liquids, unless occasioned by stranding or collision with another vessel.

If the voyage aforesaid shall have been begun and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage.

In all cases of return of premium, in whole or in part, one-half per cent., upon the sum insured, is to be retained by the assurers.

Shipments from Liverpool, Hong Kong & Shanghai

Machinery Clause

$ 100,000. (One Hundred Thousand Dollars)

Sterling

Additional $

Additional $

Additional $

Additional $

5-5-3

No. 3845
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT
FILED
MAR 20 1922
F. D. MONCKTON. CLERK.

654

STEAMERS HAVE LIBERTY TO USE PORT OR PORTS IN THE PASSAGE, PREMIUM TO BE PAID BY THE ASSURED AT THE RATES OF THIS COMPANY.

TO INCLUDE THE RISK OF LIGHTERAGE FROM THE SHORE TO THE VESSEL AT THE PORT OF SHIPMENT WHERE CUSTOMARY TO LOAD BY LIGHTERS.

Examined by

A TRUE AND FULL SCHEDULE OF PROPERTY *insured by the* **Atlantic Mutual Insurance Company**, *for Account*

of *by Policy No.* *from*

to *by Vessel or Vessels.*

NOTE.—Shipping charges to be included, unless excluded by special agreement in the Policy.

19871 Shipments to be made between

Date of Endorsement.	Date of Shipment.	Date of Arrival.	Names of Vessels.	FROM	TO	No. Packages and Kind of Goods.	Amount in Foreign Currency.	Value of Currency.	Amount in American Currency.	Rate of Prem.	Amount of Premium

To include the risk by railroad from the place of shipment in the interior of the United Kingdom of Great Britain and Ireland, France, Germany, The Netherlands, Italy, Belgium Switzerland or Austria to the ports of shipment above provided for transhipment as above.

Canton) direct or via the Suez Canal and port or ports in Europe to New York or
Hong Kong) Boston with liberty to tranship one or more times and at and thence by
Shanghai) railroad and or steamer to Providence, R. I. or via a port on the Pacific Coast of North America and at and thence by railroad to Providence, R. I.

On shipments from Canton and Shanghai the risk shall attach upon the goods being placed on carts or conveyances destined for the wharf to be laden on the sea-going steamer or in lighters for conveyance to said steamer.

To include the risk of fire in the railroad depot or on the wharf at Providence, R. I. for not exceeding three days in case of necessary detention, commencing upon discharge from the cars or steamer.

American Silk Spinning Co. (Providence, R. I.)

Policy # 23501

CLAUSES

Sept. 8, 1909. It is hereby understood and agreed that shipments made under this policy from Canton and Hong Kong shall attach as soon as the goods leave the warehouse at either of those places, including the risk of lighterage from the shore to the vessel and with respect to shipments or transhipments made at Hong Kong, in the event of any part being shut out from the vessel and detained at the port, this insurance shall continue on the same until actually shipped by the sea-going vessel or steamer.

Nov. 27/09. It is hereby agreed to insure under this policy according to its conditions shipments made by vessels sailing on and after Nov. 1/09. at and from port or ports in Japan to New York or Boston direct or via the Suez Canal and port or ports in Europe, with liberty to tranship one or more times, and at and thence by railroad and or steamer to Providence, R. I. or to a port on the Pacific Coast of North America and at and thence by railroad to Providence, R. I.

Aug. 1, 1914." War Clause 12" (12) Warranted by the assured free from claim on account of capture, seizure, detention or destruction by or arising from hostile forces, civil commotions, riots or by the acts of officers of other persons acting in the name of belligerents, or in pursuing warlike operations whether before or after declaration of war.

It is hereby agreed to waive the above clause with respect to shipments made on and after July 1, 1914, and such shipments as were made prior the date but have not arrived at destination the above clause is cancelled by cancellation at the request of the Assured, the Assured agreeing to pay premium according to the rates of the Company as the risks are reported from time to time. effective operative

Aug. 28, 1914.

(12) Warranted by the assured free from claim on account of capture, seizure, detention or destruction by or arising from hostile forces, civil commotions, riots or by the acts of officers of other persons acting in the name of belligerents, or in pursuing warlike operations whether before or after declaration of war.

It is hereby agreed to waive the above clause with respect to shipments made on and after August 26, 1914, the assured agreeing to pay premium according to the rates of the Company as the risks are reported from time to time.

Nov. 27, 1914. It is hereby agreed to insure under this policy, according to its conditions, by vessels sailing on and after Nov. 20, 1914, to the extent of but not exceeding $50,000.(Fifty Thousand Dollars)by one vessel at one time in lieu of $25,000. (Twenty Five Thousand Dollars) as hereinbefore provided.

Dec. 21, 1914. The clause endorsed on this policy Aug. 28, 1914 waiving War Clause No. 12 is hereby cancelled by request of the Assured with respect to shipments made on and after Dec. 18, 1914 ~~and with respect to shipments made on and after Dec. 18, 1914~~ and with respect said shipments the following clause is hereby restored "War Clause 12".

Sept 8, 1915.

(12) Warranted by the assured free from claim on account of capture, seizure, detention or destruction by or arising from hostile forces, civil commotions, riots or by the acts of officers of other persons acting in the name of belligerents, or in pursuing warlike operations whether before or after declaration of war. It is hereby agreed to waive the above clause with respect to shipments made on and after Aug 7 1915 from ports of shipment in Japan & China as herein provided, the assured agreeing to pay premium according to the rates of the Company as the risks are reported from time to time.

Jan. 19, 1916. It is hereby agreed on shipments insured under this policy invoiced in United States currency to value the Dollar of invoice at 11C¢. To apply to shipments made on and after Jan. 15, 1916.

Mch. 16, 1916. It is hereby agreed to insure under this policy according to its conditions by vessels sailing on and after March 1st, 1916 to the extent of but not exceeding Seventy Five Thousand Dollars ($75,000.) by any one vessel at one time in lieu of Fifty Thousand Dollars $(50,000.) as herein beforeprovided.

534

American Silk Spinning Co. (Providence, R. I.)

23501

CLAUSES

Apr. 21, 1916. It is hereby agreed to insure under this policy according to its conditions by vessels sailing on and after April 13, 1916 to the extent of not exceeding One Hundred and Twenty Five Thousand Dollars (125,000.) by anyone steamer at one time and to the extent of but not exceeding Seventy Five Thousand Dollars ($75,000.) by any one sailing vessel at one time in lieu of as herein before provided.

...y accounts within three days in case of necessary detention, commencing upon discharge from

Date of Endorsement	Date of Shipment.	Date of Arrival.	Names of Vessels.	FROM	TO	No. Packages and Kind of Goods	Amount in Foreign Currency.	Value of Currency.	Amount in American Currency	Rate of Prem.	Amount of Premium	
				Entries								
Beg insurance	Date of Bill of Lading	Sailing or	Conveyance	From	via	to					goods	
Aug 2, 1918	June 26 1918		Str Canada Maru	Canton	Seattle or Tacoma	Providence R.I.	Cancelled Aug 24 1918 per entry of Aug 8, 1918			1000	Silk Waste	
							Foreign Exchange		amt. Insured	Rate	Premo	Contract number
8	"	21	Canada Maru	Canton	via Tacoma	Providence	5262 19.6	5.50	28946	3/10 Mar 1/4 WAR	86 84 72 36	200 Bls Silk Waste SWO 5574/577 577/607
8	"	21	" "	"	"	Providence	7894 17.10	5.50	43422	3/10 Mar 1/4 WAR	130 27 108 56	300 Bls Silk Waste SWO 5574/577
8	"	24	" "	"	"	"	2894.12.6	5.50	15920	3/10 Mar 1/4 WAR	47 76 39 80	200 Bls Silk Waste HWK 577/52
8	"	24	" "	"	"	"	4342. 3.4	5.50	23882	3/10 Mar 1/4 WAR	71 65 59.70	300 Bls Silk Waste HWK 607/07

Monthly

COPY.

April 22, 1909.

Atlantic Mutual Insurance Company.

American Silk Spinning Co.

United Kingdom to U. S.

VESSEL OR VESSELS FROM EUROPE.

CARGO.

$ _____ @ *per cent.* $ _____

_____ Additional $ _____

_____ Additional $ _____

_____ Additional $ _____

_____ Additional $ _____

_____ Additional $ _____

_____ Additional $ _____

_____ Additional $ _____

_____ Additional $ _____

Record, *Folio*

#28

Defendant's Exhibit No. 29.

[Endorsed]: Case No. 2905. Defts. Exhibit 29. United States District Court, Western Dist. of Washington. Am. Silk Spinning Co. v. Director Gen'l of Railroads, etc. Filed 10/31, 1921.

No. 3845. United States Circuit Court of Appeals for the Ninth Circuit. Filed Mar. 20, 1922. F. D. Monckton, Clerk.

#34865B.

$50,000.00/100 February 6, 1919.

Received from Atlantic Mutual Insurance Co. Fifty-thousand and 00/000 dollars as a loan pending collection of proceeds of loss on 868 Bales Silk Waste ex. Str. "Canada Maru," refund of the loan to be made to said Atlantic Mutual Insurance Co. out of the proceeds of the collection specified.

Signed—AMERICAN SILK SPINNING CO.
EDGAR J. LOWNES, Pres.

$25,000.00/100 March 7, 1919.

Received from Atlantic Mutual Insurance Co. Twenty-five thousand 00/100 dollars as a loan pending collection from carriers of loss on 868 Bales Silk Waste ex. Str. "Canada Maru" & Rail, refund of the loan to be made to said Atlantic Mutual Insurance Co. out of the proceeds of the collection specified.

Signed—AMERICAN SILK SPINNING CO.
EDGAR J. LOWNES, Pres.

$27,052.96/100 March 12, 1919.

Received from Atlantic Mutual Insurance Co. Twenty-seven hundred, fifty-two 96/100 dollars as

Twenty-seven *hundred,* fifty-two 96/100 dollars as a loan pending collection from carriers of loss on 868 Bales Silk Waste ex. Str. "Canada Maru" & R. R., refund of the loan to be made to said Atlantic Mutual Insurance Co. out of the proceeds of the collection specified.

Signed—AMERICAN SILK SPINNING CO.
EDGAR J. LOWNES, Pres.

Defendant's Exhibit No. 30.

Case No. 2905—Defts. Exhibit #30.

No. 3845. United States Circuit Court of Appeals for the Ninth Circuit. Filed Mar. 20, 1922. F. D. Monckton, Clerk.

Start Express Shipments Right. Pack Right. Mark Right.

Uniform Express Receipt (Money Receipt)

The Company will not pay over $50, in case of loss, or 50 cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared and charges for such greater value paid.

(3006. 6–19)

AMERICAN RAILWAY EXPRESS CO.
(Incorporated)

Non-negotiable Receipt.

Seattle, 12/4/2.

Received from C. M. S. P., White Bldg., subject to the Classifications and Tariffs in effect on the date hereof, Six Pcs. Waste Silk (Damage Suit), value herein declared by shipper to be One Hundred Dollars.

(See footnote.)

Consigned to Philip Cheney at So. Manchester, Conn. Charges Prep. D. H. R. R. War Tax.

Which the Company agrees to carry upon the terms and conditions printed on the back hereof, to which the shipper agrees, and as evidence thereof accepts and signs this receipt.

2—

.62
.04
—
.66

C. M. & SILK CO.,
Shipper.

RYAN,
For the Company.

H. SCHROEDER.

NOTE.—The Company's charge except upon ordinary live stock, is dependent upon the value of the property, as declared or released by the shipper. If the shipper desires to release the value to $50 for any shipment of 100 pounds or less, or not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, the value may be released by inserting "not exceeding $50," or "not exceeding fifty cents per pound," in which case the company's liability is limited to an amount not exceeding the value so declared or released.

Place Your Name and Address Inside Your Shipment.

NO. 3845

United States
Circuit Court of Appeals
For the Ninth Circuit

JAMES C. DAVIS, as DIRECTOR GENERAL OF RAILROADS, operating the Chicago, Milwaukee & St. Paul Railway and AGENT appointed under the Transportation Act of 1920.

Plaintiff in Error,

vs.

AMERICAN SILK SPINNING COMPANY, a corporation,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR

GEO. W. KORTE,
C. H. HANFORD,
Attorneys for Plaintiff in Error.

NO. 3845

United States
Circuit Court of Appeals
For the Ninth Circuit

JAMES C. DAVIS, as DIRECTOR GENERAL OF RAILROADS, operating the Chicago, Milwaukee & St. Paul Railway and AGENT appointed under the Transportation Act of 1920.

Plaintiff in Error,

vs.

AMERICAN SILK SPINNING COMPANY, a corporation,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

This is an action at law by the American Silk Spinning Company, a corporation, against the Director General of Railroads, to recover damages for alleged breach of the land carrier's contract for through transportation of 1,000 bales of silk waste from Hong Kong, China, by ship to Tacoma, Wash-

ington, and thence by the Chicago, Milwaukee & St. Paul Railway and connecting carriers to Providence, Rhode Island.

In the month of June, 1918, the 1,000 bales were received by the Osaka Shosen Kaisha Steamship Company at Hong Kong, China, and thereupon that corporation, not jointly, but separately for itself and as agent of the Chicago, Milwaukee & St Paul Railway Company, issued four through Trans-Pacific and Overland order bills of lading (*Ex.* 8, 9, 10, 11; *Rec.* 642, 644, 648), two of which were for 200 bales each and the other two for 300 bales each, without mentioning the grade of silk waste contained in said bales.

The consignees named in three of said bills of lading were Messrs. Heidelbach, Ickelheimer & Company and, in the fourth bill of lading, Messrs. Goldman, Sachs & Company, bankers in New York.

Each of said bills of lading of the land carrier contained clauses as follows:

> "B. With respect to the service after delivery at the port 'A' first above mentioned, and until delivery at the point 'B' the second before mentioned, it is agreed that:
>
> "1. No carrier or party in possession of the property herein described shall be liable for any loss thereof, or damage thereto, or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper, or owner, or for differences in the weights of grain, seed or other commodities caused by natural shrinkage or discrepancies in elevator weights."
>
> "2. Except in the case of negligence of the carrier or party in possession and the burden to prove freedom from such negligence shall

be on the carrier or party in possession, the carrier or party in possession shall not be liable for loss, damage or delay occurring while the property described herein is stopped and held in transit upon request of the shipper, owner or party entitled to make such request; or resulting from a defect or vice in the property, or from the riots, or strikes."

"4. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable despatch."

"8. Any carrier or party liable on account of loss or damage to any of said property shall, by right of subrogation, have the full benefit of any insurance that may have been effected upon or on account of said property."

All of the 1,000 bales were shipped from Hong Kong on the Steamship "Canada Maru," and all were finally delivered by the railroad carriers at Providence, Rhode Island. On the 30th day of July, 1918, before arrival at her port of delivery, that vessel was stranded upon the rocks near Cape Flattery and so damaged that great quantities of sea water entered her cargo spaces (Ship's Log, *Ex.* 20). The ship was floated and towed to Tacoma where she arrived on the 10th day of August (*Rec.* 338), and 133 of the bales were taken out of the ship in an undamaged condition and promptly forwarded to destination (*Rec.* 9). The remaining 867 bales were completely submerged in sea water, the silk discolored and damaged, and there was great difficulty in unloading said bales from the ship on account of heat and offensive fumes resulting from being so submerged (*Rec.* 400, 401). They were, however, unloaded on the platform of the dock at Tacoma on the 11th and 12th days of Aug-

ust; but were never received into the railroad carrier's warehouse where goods to be forwarded were, in the ordinary course of business, received (*Rec.* 340). On account of the wet and heating condition of the bales on the dock, the Railroad's Freight Agent in charge of the local office and the docks, deemed the 867 bales to be unfit for transportation without first being reconditioned (*Rec.* 349), and one James Ayton, a Cargo Inspector, after making an examination, made a written report condemning the goods as being unfit for transportation without being reconditioned (*Ex.* 21; *Rec.* 652). Thereupon, Frank G. Taylor, assuming to act as a representative of the underwriters and owners of the goods, took possession of 867 bales (*Rec.* 105), and made a contract with the Pacific Oil Mills Company, whereby that Company undertook to dry the silk waste by opening the bales and spreading the waste on clean lumber or hanging the same on lines and drying in the open air, and, after drying, to rebale in such packages and in such manner as would be acceptable to the Railroad, and in such manner as would not increase the freight rate as applied to the original packages, for a compensation of $5,000, and that contract was fully carried out (*Rec.* 640; *Ex.* 1-A).

The process of reconditioning consumed several months of time, so that the last of the 867 bales were delivered at Providence on the 30th day of January, 1919 (*Rec.* 431).

Previous to making that contract, Taylor, in company with one Cheney, who was Chief Clerk in charge of the dock office, viewed a portion of the bales in their damaged condition, being the first

lot from the ship's hold (*Rec.* 91, 337), and Taylor inquired of Cheney if it would be possible to forward the damaged silk by silk train service and asked him if it could go in refrigerator cars; to which questions Cheney answered in the affirmative (*Rec.* 80). Taylor then asked him what it would cost to send them by silk train service and was told that it would be $7.50 per 100 as against $1.75 for the bill of lading weight, and that the cost of refrigerating—the icing and keeping the bales wet while on the wharf and en route—would be $21 per car (*Rec.* 81); and between them it was arranged to have a man go there and hose it down (*Rec.* 81); and it is claimed on the part of defendant in error that this conversation constituted a contract binding upon the railroad carrier, to complete the service of transportation of the 867 bales while in damaged and abnormal condition.

The 1,000 bales were insured by the Atlantic Mutual Insurance Company against loss or damage in transit from Hong Kong to Providence (*Rec.* 20) and the defendant in error received on account of such insurance, February 6th, 1919, $50,000, and on March 7th the further sum of $25,000, and on March 12th, a final payment of $27,052.96, and the defendant in error gave the said Insurance Company receipts for said payments "as a loan pending collection of proceeds of loss on 868 bales of silk waste, ex Steamer 'Canada Maru,' refund of the loan to be made to said Insurance Company out of the proceeds of the collection specified" (*Ex.* 29; *Rec.* 661).

The consignees named in the bills of lading are New York bankers, who paid the purchase price for the silk to the Chinese vendor by commercial letters

of credit, whereby payment was due four months after the date of the shipment from Hong Kong (*Rec.* 127). The bills of lading were endorsed by the bankers for delivery of the goods to the defendant in error upon trust receipts given by the defendant in error, guaranteeing that the goods belonged to said bankers until paid for, and the payments were made four months after the date of the shipment (*Rec.* 127, 128).

The amount of the damages sued for, including the $5,000 paid for reconditioning, was $75,869.62, which, by an amendment on the trial, was increased to $105,622.90 (*Rec.* 5).

STATEMENT OF ISSUES

The defendant in error is not suing as assignee of a right of action for breach of a carrier's contract.

The complaint is in six paragraphs, the first two of which state formal and jurisdictional facts.

The first controverted allegation of the complaint is in the third paragraph in the words following:

> "That said consignees named in said bills of lading did, for a valuable consideration, and prior to the arrival of said silk at Tacoma, Washington, endorse said bills of lading to the plaintiff, and the plaintiff thereupon became the owner of said bills of lading and the said silk and became entitled to the delivery of said silk as provided in said bills of lading."

This is a plea of title and absolute ownership of the silk and that plea is denied by the answer.

The fourth paragraph of the complaint, after reciting arrival of the ship at Tacoma, and the facts

as to the wet condition of 867 bales, alleges that the 1,000 bales were

> "delivered into the possession of the defendant for transportation to destination as aforesaid under and in pursuance of the terms of said bills of lading. That defendant accepted all of said silk for transportation, and, in consideration of the freight prepaid to his agent as aforesaid, the defendant agreed to transport the same to destination as aforesaid. * * * but that the defendant, after accepting said 867 bales of wet silk for transportation, failed and refused to transport said bales of wet silk to their destination, but demanded that said silk be dried and reconditioned before defendant transported the same to destination, all contrary to the terms and requirements of his contract of carriage aforesaid" (*Rec.* 3, 4).

These allegations are denied by the answer.

The fifth paragraph of the complaint alleges that, in order to have the wet bales transported, and without waiving any of its rights, the plaintiff "did cause said wet silk to be treated and reconditioned as required and demanded by the defendant, and thereby incurring an expense of $5,000" (*Rec.* 4, 5).

The answer makes an issue as to any waiver of rights, as to any requirement or demand on the part of the plaintiff in error and as to the amount of expense for whatever was done in treating and reconditioning the silk waste (*Rec.* 10).

The sixth paragraph alleges:

> "That as the natural and proximate result of the drying and reconditioning of said wet silk, the colors of said silk became fixed and permanent and the silk was otherwise damaged and

> the delivery of same at destination was greatly delayed, thereby causing great loss and damage to plaintiff. That, by reason of the wrongful failure and refusal of the defendant to transport said silk in the condition in which defendant accepted the same for transportation and agreed to transport the same as aforesaid, the plaintiff has been damaged in the sum of $100,622.75, in addition to the sum of $5,000 expended by the plaintiff in drying and reconditioning the said silk, making a total damage to the plaintiff of $105,622.90 (*Rec.* 5).
>
> That the defendant has wholly failed and refused to pay the plaintiff any part of said sum, although demand therefor has been made (*Rec.* 5.)

The answer admits failure to pay the damage claimed and denies all other allegations of that paragraph (*Rec.* 10).

For his defense, the plaintiff in error filed a plea in abatement (*Rec.* 7), alleging that the defendant in error is not the real party in interest which is prosecuting this action, for that the property damaged was insured against loss while in transit, and the defendant in error had, previous to commencing the action, received from the Atlantic Insurance Company of New York, the insurer, full compensation for the damage, and setting forth that provision in the bills of lading entitling the railway carrier to the benefit of any insurance that may have been effected upon or on account of the property, and that the defendant in error, as a mere volunteer and in collusion with the Insurance Company, commenced and prosecutes the action for the sole benefit of said insurer, and that if a judgment for any amount of money should be rendered, the same would inure to the insurer.

The answer to the complaint also contains three affirmative defences, the first of which, after quoting from the bill of lading contracts the clause exempting the railroad carrier from liability for loss, damage or delay, alleged the facts as to the condition of 867 bales and the unfitness thereof for transportation in a wet condition at the time when the same were discharged from the ship, and alleged that the only delay in performing the transportation service pursuant to the contracts contained in said bills of lading occurring subsequent to the unloading of said silk waste from the "Canada Maru," was due to the necessary and unavoidable stoppage of said property in transit because of the defect and vice in the property due to the marine disaster (*Rec.* 11, 12).

The second affirmative defence, after quoting the clause in the bill of lading contracts entitling the railroad carrier to the benefits of any insurance effected, alleged that the goods were insured by the Atlantic Insurance Company and that full compensation for the damage had been paid by the insurer (*Rec.* 12, 13).

The third affirmative defence is a plea of estoppel, on the ground that, because of the unfitness of the 867 bales for transportation, when discharged from the ship, the defendant in error withdrew the 867 bales from the carrier's possession for the purpose of being dried and reconditioned, so that whatever damage, if any, was caused by the process of reconditioning, was the result of the plaintiff's own conduct and treatment of the goods (*Rec.* 13, 14).

The reply admits that the bill of lading contracts contained the provisions alleged in the

answer, admits that the goods were insured, and admits that the insurer paid a certain sum of money which is claimed to have been a loan and not in discharge of the insurer's obligation; and admits that the defendant in error caused the wet bales to be reconditioned before the transportation thereof to destination, but makes formal denials of the other matter affirmatively pleaded in said defences.

Questions for decision:

The first question which the Court is called upon to decide is, whether or not the defendant in error is the real party in interest, and, as such, entitled to maintain the action for the causes set forth in its complaint.

The second question is, whether or not the facts alleged in the complaint amount to a breach of the bill of lading contracts.

The third question is kindred to, but different from, the second, namely:—Do the facts proved by the evidence constitute a breach of the bill of lading contracts or any contract alleged in the complaint?

An incidental question, upon which the major question as to the carrier's liability may be hinged, is:—Did the plaintiff in error become bound to accept and transport the 867 bales by any contract other than, or different from, that contained in the bills of lading?

Another incidental question, kindred to the first, is, whether or not the defendant in error, by reason of the ownership of the goods, or as assignee, ac-

quired or ever had any right of action arising out of the contract sued on.

Unless the Court shall reach a conclusion adverse to the contentions of the plaintiff in error, the litigation will be determined by the decision of the foregoing questions; otherwise, the Court may have to determine the amount of damages.

ASSIGNMENTS OF ERROR

The plaintiff in error relies upon, and will discuss, all of the assignments of error, which are as follows:

Assignment of Error No. I.

The Court erred in admitting and considering the following irrelevant and incompetent testimony:

In the deposition of Arthur D. Little, page 109 of the defendant's bill of exceptions, the following question was propounded by counsel for the plaintiff:

> "To a person having experience in handling commodities and cargoes ordinarily shipped on railroads in the United States, is there any reasonable justification for assuming that because a cargo of Canton silk waste which has been wet with sea water is heating to a certain degree and giving off ammonia—in assuming that the cargo is dangerous or liable to spontaneous combustion if transported,"

and to that question the counsel for the defendant objected, on the ground that it called for an opinion as to the ultimate facts to be passed upon by the Court, and did not call for an opinion upon a matter provable by the testimony of an expert witness, and

on the further ground that the witness is not qualified to testify as an expert in answer to that question.

To which question the witness made the following answer:

> "In my opinion, there is none, both for the reason that silk waste is well known not to be subject to spontaneous combustion, and for the further fact that the ammonia evolved is in itself an efficient fire extinguisher."

and the defendant excepted to the ruling of the Court admitting said answer in evidence, and his exception was allowed.

And in the same deposition the following question was propounded by counsel for the plaintiff:

> "I show you a pamphlet entitled:
>
> 'INTERSTATE COMMERCE COMMISSION REGULATIONS FOR THE TRANSPORTATION OF EXPLOSIVES AND OTHER DANGEROUS ARTICLES BY FREIGHT,' dated September —, 1918, page 49 thereof, article 1801, regarding 'Forbidden Articles.' Subsection (d) reading as follows:
>
> 'Rags or cotton waste oily with more than 5 per cent of vegetable or animal oil, or wet rags, or wet textile waste, or wet paper stock,'
>
> and ask you whether Canton steam silk waste could properly or reasonably be classified under any of these words?"

and to that question the defendant objected, and notwithstanding his objection, the witness was permitted to answer.

And to that question the witness made the following answer:

> "It is certainly not to be classified as rags or cotton waste oily with more than five per cent of vegetable or animal oil, since the Canton steam silk waste contains practically no oil and has moreover not been processed in any such sense as rags or cotton waste. Neither can it be classified as wet rags or wet paper stock, nor as wet textile waste for the reason in the latter case that it bears the same relation to cotton or other textile waste that raw cotton or cotton linters bear to the waste of the textile mill. It is, in fact, although called a waste, a valuable and well recogniezd raw material for an important manufacture."

and to the admission of said testimony the defendant excepted, and his exception was allowed by the Court.

And in the same deposition the following question was propounded by counsel for the plaintiff:

> "Whether or not a freight claim agent of such a road ought to have known the commodity known as Canton steam silk waste with its relation to the possible danger of spontaneous combustion?"

and to that question the defendant excepted for the reason that it calls for an opinion upon a man's mentality; but, notwithstanding said objection, the witness was permitted to answer.

To the above question the witness made the following answer:

> "Canton steam silk waste is a commodity of such well known character and frequent shipment and commercial value that those engaged in its transportation, and particularly the freight agents of trans-continental railroads, by which such material is commonly transported, might, it seems to me, in my opinion, be proper-

> ly assumed to possess the general knowledge of its properties and characteristics as regards any tendency to spontaneous combustion. In other words, they should know that it is commonly recognized that it has no such tendency."

and to the admission of that testimony the defendant excepted and his exception was allowed by the Court.

And in the deposition of Edward A. Barrier, defendant's bill of exceptions, page 123, the following question was propounded to said witness by counsel for the plaintiff:

> "Assume the facts that I have stated in my hypothetical question up to the time that the bales of silk were unloaded on the wharf, and assume that they were wet down with a hose and that approximately one-half of the cargo had been loaded in refrigerator cars, and that the assistant freight claim agent of the defendant railroad, the Chicago, Milwaukee & St. Paul, had at that time directed that the silk be unloaded from the refrigerator cars and that it be not shipped unless it was first frozen or dried—whether or not such claim agent would have been reasonably justified in assuming that the wet silk waste was a dangerous commodity to be transported and liable to spontaneous combustion?"

and to that question the defendant excepted, on the ground that it calls for the conclusion of the witness upon ultimate facts and relates to an opinion in relation to the facts which do not involve technical knowledge or the knowledge of an expert, and, therefore, the witness is incompetent to testify as to such matters. But, notwithstanding said objection, the witness was permitted to answer as follows:

> "I do not consider that the freight agent would be justified in taking that action. I might say that my reason for that is this: That I believe that a man whose duties are to pass on such important questions as that should be familiar at least with the general properties of the materials with which he is dealing, and the properties of raw silk with reference to the possibility of spontaneous ignition, such as are generally known among those that are qualified to give information on the subject, can be easily obtained."

and to that answer the defendant excepted and his exception was allowed by the Court.

And the following question was propounded to the same witness by counsel for the plaintiff:

> "Is the fact that a commodity of animal or vegetable origin heats from fermentation, alone reasonable ground for assuming that it is a dangerous commodity to transport or that it is liable to spontaneous combustion?"

and to that question the defendant objected, on the ground that it called for an opinion on the ultimate facts and not an opinion relating to anything which calls for technical knowledge. Notwithstanding said objection the witness was permitted to answer.

To the above question the witness made the following answer:

> "I should say not. The railroads are regularly transporting material which is subject to heating which does not ignite spontaneously."

and to the admission of that testimony the defendant excepted, and his exception was allowed by the Court.

And in the deposition of Harry Albert Mereness,

defendant's bill of exceptions, page 200, the following question was propounded to said witness by counsel for the plaintiff:

> "Assume further that when the silk waste had first been discharged from the vessel, it had heated to some extent and that it had been wet down by hose, and that on August 15th and 16th the heating had reduced and that in some bales it had disappeared entirely; that ammonia fumes were coming off—whether or not, under those conditions, there would have been reasonable grounds for assuming that there was any danger from spontaneous combustion in transporting the cargo in refrigerator cars iced across the continent?"

and to that question the defendant objected, on the ground that the question is incompetent, immaterial and irrelevant, and the witness is not competent to give his opinion on the subject, and it calls for an opinion on a subject which an expert is incompetent to give, and it is the conclusion of a given state of facts which the jury or Court must pass upon. But, notwithstanding said objection, the witness was permitted to answer the question.

To the foregoing question said witness made the following answer:

> "Under the conditions that you have outlined, I have no reason to believe that there would be any danger due to spontaneous combustion in shipping this cargo."

and to that testimony the defendant excepted, and his exception was allowed by the Court.

Assignment of Error No. II:

At the conclusion of the trial and after the argument by counsel for the plaintiff and defendant respectively, the cause was taken under advisement by the Court, and, in due time, before the rendition of the Court's decision, the defendant submitted in writing proposed findings of fact and conclusions of law, and requested the Court to make findings and conclusions accordingly, including the following:

> "On the 30th day of July, 1918, the 'Canada Maru,' with said 1,000 bales on board, met with a maritime disaster by striking on rocks and stranding on the coast of Washington near Cape Flattery, and said vessel was thereby so badly damaged that her hold and cargo space were filled with sea water and eight hundred and sixty-seven (867) of said bales were completely submerged in the hold of said vessel."

and to make said findings the Court refused, and to the ruling of the Court, in refusing to make said findings, the defendant at the time excepted, and said exception was allowed by the Court.

Assignment of Error No. III:

Defendant also requested the Court to make a finding as follows:

> "Said vessel was rescued from her perilous position and towed to Tacoma, where she arrived on the 10th day of August, 1918, and from thence proceeded to a dry dock for necessary temporary repairs before commencing to discharge cargo. After returning to Tacoma she commenced discharging said bales of silk on

> the 12th day of August, and completed discharging said bales on the 16th day of August, 1918."

and to make said finding the Court refused, and to the ruling of the Court in refusing to make said finding the defendant excepted, and his exception was allowed by the Court.

Assignment of Error No. IV:

And defendant also requested the Court to make a finding as follows:

> "When discharged from said vessel, one hundred thirty-three (133) of said bales were found to be undamaged and the same were promptly transported to destination. The other 867 bales were completely saturated with sea water, whereby heat and malodorous fumes emanated therefrom to such an extent that the stevedores were able only with great difficulty to remove the same from the hold of said vessel, and, after being unloaded on the dock, heating and diffusion of malodorous fumes continued, to such an extent that, after inspection by a Cargo Surveyor, said 867 bales were, by agents of the Chicago, Milwaukee & St. Paul Railway Company and said Cargo Surveyor, deemed to be dangerous to handle, dangerous to carry by railway from Tacoma to Providence, and unfit for transportation without being reconditioned."

and to make said finding the Court refused and to the ruling of the Court in refusing to make said finding the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. V:

And the defendant also requested the Court to make a finding as follows:

> "All of said 1,000 bales were insured against damage in transit from Hong Kong to Providence by the Atlantic Mutual Insurance Company; and during the time of the unloading of the said bales from said vessel, Frank G. Taylor, representing the Underwriters, by direction of the Atlantic Mutual Insurance Company, visited the premises where said wet bales were, for the time being, situated, and became informed as to the condition thereof, and, after being definitely informed by the Agents of the Chicago, Milwaukee & St. Paul Railway Company that the same were deemed to be unfit for transportation and that said Railway Company would not assume the risk of transporting the same from Tacoma in their wet condition, caused said wet bales to be removed from Tacoma to Seattle for the purpose of being reconditioned by drying the same and entered into a contract with the Pacific Oil Mills, at Seattle, to perform the service of drying and rebaling the contents of said bales after being dried and redelivering the same, which contract was performed by said Pacific Oil Mills, and for said service said Taylor paid Five Thousand ($5,000.00) Dollars."

and to make said finding the Court refused and to the ruling of the Court, in refusing to make said finding the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. VI:

And defendant also requested the Court to make a finding as follows:

> "That the time consumed in completing said

operation of drying extended until the 20th day of January, 1919."

and to make said finding the Court refused, and to the ruling of the Court in refusing to make said finding the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. VII:

The defendant requested the Court to find and include in its findings of fact the following:

"That, after being reconditioned as aforesaid, all of the contents of said 867 bales were, by the Chicago, Milwaukee & St. Paul Railway and connecting lines, transported from Seattle to, and delivered at, Providence, Rhode Island, that service being completed on the 30th day of January, 1919."

To make such finding the Court refused, and to the ruling of the Court in refusing to make said finding the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. VIII:

The defendant also requested the Court to make a finding as follows:

"On the security of letters of credit all of said 1,000 bales were sold by the manufacturers in China on a credit of four (4) months from the date of shipment thereof from China; the consignees aforesaid, without receiving immediate payment of the purchase price for said merchandise, at the time of delivering said bills of lading to the plaintiff, took from said plaintiff a trust receipt, in effect stipulating that said merchandise belonged to said consignee until the purchase price aforesaid should be paid,

which payment was made at the time of, and not before, the expiration of said four months period of credit, which was on or about October 24th, 1918, and at that time, by said payment, the plaintiff acquired ownership of said merchandise."

To make said finding, the Court refused, and to the ruling of the Court in refusing to make said finding, the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. IX:

The defendant also requested the Court to make a finding as follows:

"In whatever way said merchandise became damaged or diminished in value, subsequent to the unloading thereof from the 'Canada Maru,' such damage or impairment of value occurred and was fully consummated during the time intervening between the 12th day of August and the 24th day of October, 1918, during which time the consignees, Heidelbach, Ickelheimer & Co. and Goldman, Sachs & Co., named respectively in said bills of lading, were owners of said merchandise."

To make said finding the Court refused, and to the ruling of the Court in refusing to make said finding, the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. X:

The defendant also requested the Court to make a finding as follows:

"The market value of the silk waste contained in said 867 bales, on arrival at Providence in the due and ordinary course of transportation,

> if then undamaged, would have been $125,-653.78; that gross sum being arrived at by computation of the market value of two grades of silk waste, No. 1 grade being at the rate of $1.51 per pound, of which there was 46,613 pounds, and No. 2 grade at $0.87 per pound, and there is a total failure on the part of plaintiff to introduce any evidence respecting the weight of the silk of said No. 2 grade; and there is a total failure on the part of the plaintiff to prove the difference in market value between the sound value—viz.: $125,653.78—and the market value of said merchandise at the time of its delivery at Providence in the state it was after being reconditioned as aforesaid."

The Court refused to make said finding, and to the ruling of the Court in refusing to make said finding, the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. XI:

And the defendant also requested the Court to make a finding as follows:

> "That in the months of February and March, 1919, The Atlantic Mutual Insurance Company paid the plaintiff sums of money aggregating Seventy-seven Thousand, Seven Hundred Fifty-two and 96-100 Dollars, and there is a total failure on the part of plaintiff to prove that any damage by deterioration of said merchandise, or expenses chargeable as a loss incidental to the transportation thereof, amounts to any sum in excess of said $77,752.96 paid by said Insurance Company as aforesaid, whereby the plaintiff, previous to the commencement of this action, received full compensation for whatever loss or damage it may have sustained in con-

nection with the transportation of said merchandise."

The Court refused to make said finding, and to the ruling of the Court in refusing to make said finding, the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. XII:

And the defendant requested the Court to make a finding as follows:

> "The defendant did not make, or enter into, any agreement for transportation of said 867 bales while in the wet condition in which they were discharged from the 'Canada Maru,' or any agreement whatsover respecting the transportation of said merchandise other than, or different from, the written contract contained in said four bills of lading, nor at any time accept said 867 bales, or any part thereof, for transportation without being reconditioned."

To make said finding, the Court refused, and to the ruling of the Court in refusing to make said finding, the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. XIII:

The defendant also requested the Court to make a finding as follows:

> "The defendant did not, by any act or omission, cause, or contribute to the cause of, any damage whatever or impairment of value of said merchandise, or any part thereof, or in any manner fail to fully and completely perform his contract for that part of the transportation by his Railroad."

The Court refused to make said finding, and to the ruling of the Court in refusing to make said

finding, the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. XIV:

The defendant requested the Court to include in its conclusions of law the following:

> "The plaintiff herein is not the real party in interest nor entitled by law to maintain this action,"

which request was refused by the Court, and to the ruling of the Court in refusing to make said finding, the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. XV:

The defendant requested the Court to make as a conclusion of law the following:

> "The defendant is not, by any act or omission, guilty of any breach whatever of the contract sued on herein,"

which request was refused by the Court, and to said refusal the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. XVI:

And the defendant requested the Court to make as a conclusion of law the following:

> "The defendant is entitled to have a judgment in his favor that the plaintiff take nothing by its action herein."

The above request was refused by the Court, and to the ruling of the Court in refusing to make said finding, the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. XVII:

The Court made findings of fact and conclusions of law in writing, including the following, contained in paragraph Three of said findings of fact:

> "That 500 bales were of the quality known as 'No. 1 Canton Steam Waste Silk' and 500 bales were of the quality known as 'No. 2 Canton Steam Waste Silk';"

which the defendant assigns for error for the reason that no evidence was introduced upon the trial indicating the number of bales of the qualities known as No. 1 and No. 2 Canton Steam Silk Waste.

Assignment of Error No. XVIII:

Paragraph numbered VIII of the Court's findings includes the following:

> "That on July 30, 1918, and during the time said bales of waste silk were in the course of transportation on said S. S. Canada Maru under the said bills of lading, said vessel stranded and large quantities of salt water entered her holds, and as a result 500 bales of waste silk known as 'Canton Steam Waste Silk No. 1' and 367 bales of said waste silk known as 'Canton Steam Waste Silk No. 2' became wet from the contact with the salt water,"

which finding the defendant assigns for error, for the reason that no evidence was introduced upon the trial indicating the number of bales of the qualities of No. 1 and No. 2 Canton Steam Silk Wastes.

Assignment of Error No. XIX:

Paragraph numbered Nine of the Court's findings of fact includes the following:

> "That after the vessel had commenced dis-

charging the wet silk, Mr. Taylor, the representative of the underwriters and owners thereof, called on Mr. Cheney, the Chief Clerk of the Freight Agent at Tacoma, and who was in charge of the dock and the movement of freight therefrom, and told Mr. Cheney that he was very anxious to have quick dispatch of the wet silk, and that it was important that it should go forward in its wet condition. Cheney and Taylor looked at the silk as it was being discharged from the vessel and placed on the dock, and Taylor requested that it be forwarded by silk train service in refrigerator cars, and Cheney agreed to so forward it, stating that the cost of such service would be $7.50 per hundred pounds as against the bill of lading freight of $1.75 per hundred, and that there would be an additional charge for refrigeration of approximately $21.00 per car to pay, all of which Taylor agreed to.

On August 14th, Taylor again called on Cheney to see how the matter was progressing, and he and Cheney again examined the silk, and Taylor was told by Cheney that the cars had been ordered and would be brought in shortly, and thereafter the cars were brought in, and approximately one-half of the wet silk bales were loaded on two or more refrigerator cars for shipment,"

which finding the defendant assigns for error, for the reason that no evidence was introduced upon the trial tending to prove that the person named "Cheney," referred to in said findings, was in charge of the dock or the movement of freight thereupon, or that he had any authority to make or enter into any agreement respecting the transportation of freight, and for the further reason that the uncontradicted evidence in the case and all the evidence upon that point proves affirmatively that said Che-

ney did not have any authority whatever to make, or enter into, any agreement respecting the transportation of freight, and, for the further reason, that by the Interstate Commerce Law railroad carriers are strictly prohibited from entering into special contracts, or special service at special rates, for the transportation of freight and for the further reason that Taylor did not, in fact, pay, or tender payment, or make any promise binding upon the plaintiff to pay extra charges for the services required for transportation of 867 bales by silk train, or the extra charge for transportation of said bales in refrigerator cars, and for the further reason that said finding does not include the requirement by Taylor for sprinkling or drenching said wet bales so as to keep them continuously wet during the time of transit to destination.

Assignment of Error XX:

The Court erred in making the finding numbered as paragraph X, for the reason that said finding is not true, is not supported by any evidence whatever, and is contrary to all the evidence bearing upon the question as to the making of a special contract for transportation of 867 bales in their wet condition.

Assignment of Error No. XXI:

The Court erred in making the finding contained in paragraph thereof numbered XI, for the reason that the same is not true, is not supported by any evidence, and all the evidence proves affirmatively that the wetting of said 867 bales generated heat and caused diffusion of offensive fumes so that the same were difficult to handle, liable to cause

spontaneous combustion and fire while confined in freight cars and were totally unfit for transportation without being reconditioned; and for the further reason that the Court's finding that transportation of said bales while in a wet condition was not prohibited by any regulation of the Interstate Commerce Commission, is immaterial.

Assignment of Error No. XXII:

The Court erred in its findings of fact in paragraph numbered XII, that the reasonable costs and expense of drying said bales was Five Thousand ($5,000) Dollars, which sum plaintiff paid therefor, for the reason that no evidence was introduced upon trial to support a finding as to the reasonable costs and expense of drying said bales, and there was no evidence tending to prove that the plaintiff paid said sum of Five Thousand ($5,00) Dollars, or any part thereof. And the evidence proves affirmatively that whatever sum was paid for drying said bales was paid by Frank Taylor, the representative of the Insurers.

Assignment of Error No. XXIII:

The Court erred in making the following finding, included in paragraph numbered XII, that the plaintiff, in taking possession of said 867 bales of wet waste silk for the purpose of drying it, did so without relinquishing any part of plaintiff's rights in the premises, for the reason that there was no evidence introduced upon trial tending to prove that there was any reservation of rights in behalf of any party in taking possession of 867 bales for the purpose of reconditioning the same.

Assignment of Error No. XXIV:

The Court erred in making the finding contained in paragraph numbered XIII, that the natural and proximate result of the drying of said bales was a weakening of the fiber and a discoloration of said waste silk, for the reason that there was no evidence introduced upon the trial tending to prove that the drying of said bales had any tendency to weaken the fiber or cause discoloration of said waste silk, and said finding is not true, and all the evidence in the case proves that the damage to 867 bales was entirely due to the wetting thereof.

Assignment of Error No. XXV:

The Court erred in making the finding contained in paragraph thereof numbered XIII, that upon arrival of said 867 bales of waste silk at destination, a reasonable, fair market value thereof was the sum of Fourteen Thousand Eight Hundred Fifteen and 67-100 ($14,815.67) Dollars, for the reason that there was no evidence introduced upon the trial tending to prove the market value of said bales on arrival at destination, or that said market value was not in excess of the sum aforesaid.

Assignment of Error No. XXVI:

The Court erred in making the finding contained in paragraph numbered XIV of its findings of fact, for the reason that no evidence was introduced upon the trial that 500 bales or any number of bales of wet silk were of the grade known as No. One (1) nor that the market value of said bales of No. 1 was Ninety-five Thousand Three hundred ninety-four and 25-100 ($95,394.25) Dollars less ten per cent (10%), nor that the market value of the bales

of No. 2 quality was Forty Thousand Three Hundred Forty-two and 27-100 ($40,343.27) Dollars, less ten per cent (10%), nor that the total value of said 867 bales was One Hundred Twenty-two Thousand One Hundred Sixty-three and 32-100 ($122,163.32) Dollars, and said finding is not true and all of the evidence in the case proves that the quantities and value of 867 bales was One Hundred Thirteen Thousand Eighty-eight and 40-100 ($113,088.40) Dollars.

Assignment of Error No. XVII:

The Court erred in making the finding contained in paragraph numbered XV of its findings of fact, for the reason that no evidence was introduced upon the trial tending to prove that the amount payable by the plaintiff for extra service required in transportation of said 867 bales to destination in their wet condition was Six Thousand Seven Hundred Twenty-four and 75-100 ($6,724.75) Dollars, and said finding is not true because the uncontradicted evidence proves that the tariff of rates on file with the Interstate Commerce Commission made no provision fixing any rate for such or similar extra service and any special contract or special rate for extra service was and is contrary to law.

Assignment of Error No. XXVIII:

The Court erred in its findings contained in paragraph thereof numbered XVI, for the reason that no evidence was introduced upon the trial tending to prove that the amount of the plaintiff's damages was One Hundred Five Thousand Six Hundred Twenty-two and 90-100 ($105,622.90) Dollars, or any amount whatever, and the same is not true, and the plaintiff was not damaged in any sum what-

ever, caused by any act, omission or failure on the part of the defendant to fully perform the contract undertaken and covered by the bills of lading.

Assignment of Error No. XXIX:

The Court erred in its findings of fact contained in paragraph thereof numbered XVII, that all or any part of the money paid to the plaintiff by the Atlantic Mutual Insurance Company was a loan, for the reason that all of the evidence introduced upon the trial, relating to said payment, proves that said payment was made without any obligation on the part of the plaintiff to repay the same, or any part thereof, except whatever sum might be collected from the defendant, and that the payment made extinguished the liability of the Atlantic Mutual Insurance Company as an insurer of the shipment of silk.

Assignment of Error No. XXX:

The Court erred in its conclusions of law in paragraph thereof numbered I, for the reason that by the uncontradicted evidence introduced upon the trial, it was proved that the plaintiff is not the real party in interest in prosecuting this action, but commenced and maintained the same for the sole benefit of the Atlantic Mutual Insurance Company, and the uncontradicted evidence and all of the evidence introduced on the trial proved that the plaintiff was not the owner of 867 bales at the time when the same were damaged.

Assignment of Error No. XXXI:

The Court erred in its conclusions of law contained in paragraph numbered II, for the reason there was no contract between Cheney and Taylor for the

movement of 867 bales, that Cheney was not an authorized agent to make any contract binding on the defendant with respect to the transportation of freight, and if such contract had been formally made, it would have been unlawful and unenforcible because expressly forbidden by the provisions of the Interstate Commerce Law.

Assignment of Error No. XXXII:

The Court erred in its conclusions of law contained in paragraph numbered III thereof, for the reason that the same is contrary to the facts proved on the trial and contrary to the law.

Assignment of Error No. XXXIII:

The Court erred in rendering the judgment against the defendant, for the reason that the findings of fact as made and signed by the Court are insufficient to justify the conclusions of law and insufficient to support said judgment.

Assignment of Error No. XXXIV:

The Court erred in rendering a final judgment in this action, for the reason that instead of being in favor of the plaintiff, the right judgment should have been in favor of the defendant.

WHEREFORE, the defendant prays the United States Circuit Court of Appeals for the Ninth Circuit for a review of this action, pursuant to the writ of error to be sued out herein and to reverse the final judgment of the District Court for the Western District of Washington, Southern Division.

ARGUMENT

The assignments of error are sufficiently specific to present for consideration all of the important questions for decision as above stated, and a discussion of those questions will comprehend all of the assignments of error. Therefore, it will be the most satisfactory way of arguing the case to take those questions in the order stated.

I.

The plea in abatement states facts sufficient in law to require an abatement of the action. By what is commonly known as the "Conformity Act," comprised in Section 914, U. S. R. S., the practice in actions at law in the federal court is controlled by the state law. This is an action at law, and by force of Section 179 of Remington's 1915 Code, it is maintainable only by a plaintiff who is the real party in interest; that is to say, the party entitled to receive, retain and enjoy the fruits of a decision in the plaintiff's favor; and Section 189 of the same Code provides that

> "All persons interested in the cause of action, or necessary to the complete determination of the question involved, shall, unless otherwise provided by law, be joined as plaintiffs when their interest is in common with the party making the complaint."

These provisions of the statute are mandatory and in accordance with the fundamental principle that, in order to adjudicate the rights of parties, a court must have jurisdiction over the parties. This case does not come within any exception to the rule requiring presence of the real party in interest; one of the exceptions permits the assignee of

a chose in action to sue thereon, but the assignment, to confer such authority, must be in writing, and one of the facts of this case is, that there is no assignment, or claim of an assignment, of the cause of action.

The real party in interest, within the meaning of the statute is the party who will be entitled to the benefits of the action if the plaintiff prevails; one who is substantially interested in the subject matter as distinguished from one who has only a nominal, formal, or technical interest in, or connection with it.

> *Encycl. of Pl. & Pr.*, p. 710, citing *Black's Law. Dic.*, 997.

In the case of *Marine Ins. Co.* vs. *St. Louis I. M. & S. Ry. Co.*, 41 Fed. Rep., 645, it was held that where an insurer had paid the full value of the property destroyed, the owners of the property had no interest in, and were not necessary parties to, a suit to recover damages against a wrong-doer causing the loss; and it has been held by the Supreme Court of the State of Washington that an action to recover damages for injury to property, by a plaintiff who has received full compensation for the injury, cannot be maintained, the reason given for that decision being, that a plaintiff in that situation is not the real party in interest.

> *Broderick* vs. *P. S. T. L. & Power Co.*, 86 Wash., 399.

In the case of *Palmer* vs. *O-W. R. & N. Co.*, 208 Fed. Rep., 666, insurance companies carrying insurance on a mill which had been destroyed, paid to a co-plaintiff the loss alleged to have been caused by the defendant's tort, and one of the questions decid-

ed was, whether the insurance companies were proper parties in the case. In his decision Judge Cushman said:

> "Under the statutes of the State of Washington and the decisions of its courts, the Insurance Companies are held to be the real parties in interest, *and therefore, necessary parties.*" (Italics added.)

In the litigation of this cause, the real facts and legal rights of the parties must be adjudicated, and the injustice of allowing the plaintiff, who is a mere volunteer, to be used as the instrument of an outsider to carry on the lawsuit, is especially manifest in this case, wherein a demand is made in utter disregard of a stipulation in the contract, which contract is the basis of this action.

In this case the parties agreed that the railroad carrier should have the benefit of insurance against loss or damage to the goods in transit; insurance was effected, not only by the issuance of a policy, but by actual payment of an amount of money covering the amount of loss; payment was made under terms and conditions requiring that whatever money might be recovered by litigation for damages should pass to the insurer instead of being retained by the party prosecuting the action (*Deft's Ex.* 29; *Rec.,* 661).

In this case, were the insurance corporation, for whose benefit the action is being prosecuted, in court as the plaintiff, it would necessarily invoke the law of subrogation; and the issues of fact and law to be determined would be different from and broader than the simple issues in an action to recover damages for breach of a carrier's contract. The manifest purpose in bringing this action in the

name of a party claiming ownership of damaged goods, is to evade the question which must be determined in order to adjudicate the rights respectively of the defendant and the insurer.

II.

A party suing to recover damages for breach of contract is necessarily required to set forth in a pleading the fact that the contract was broken, with particularity as to each act or omission constituting the breach. Here, the contracts are set forth in the documents Exhibits 8, 9, 10 and 11.

There is and can be no controversy with respect to the obligations and duties assumed by the carrier. The substantial part of that obligation was to carry from the landing port on Puget Sound to Providence, Rhode Island, and there deliver, 1,000 bales of silk waste; the carrier being unrestricted with respect to any particular train or cars to be used for the purpose, and unrestricted as to the time of performing the service, except that it was to be with reasonable despatch. The complaint alleges affirmatively that the main purpose of the contract was actually and literally performed, because the goods were carried to, and delivered at, destination. Delay in the performance of that service is all that is charged in the complaint as constituting a breach of the contract. But in the same connection—that is, in paragraph four of the complaint (*Rec.* 4)—facts are stated showing the circumstances which caused the delay, bearing directly upon the question as to whether or not the service was performed with reasonable despatch. It is there alleged that 867 bales were, in consequence of a marine disaster, wet from contact with salt

water; that the defendant refused to transport the bales of wet silk until the same had been reconditioned by drying.

Delays in transportation of merchandise are not unusual, and, by reason of the frequency thereof, shippers and cariers necessarily have to contemplate contingencies that may cause delays, and prudence dictates that their contracts shall be made to express the liabilities, or exemptions from liability, in case of such contingenicies; so we have in the bill of lading contracts an express provision exempting the carrier from liability for delay, under specified circumstances and conditions. By reason of that clause in the contracts, mere delay does not, in and of itself, constitute a breach of the carrier's contract. In view of that exemption clause, the fourth paragraph of the complaint attempts to amend the contract, or to substitute for the written contract a different contract to be implied from acts of representatives of the carrier in accepting the bales for transportation in the wet condition. In this statement we are giving a liberal and broad interpretation to the pleader's allegations, and, even so, the alleged breach by delay was not a failure to perform the contract set forth in the bills of lading, and before the carrier can be held responsible for failure to perform the service according to contract. a new, different and lawful contract must be established.

A breach of contract, to give rise to an action for damages, must necessarily be the cause of actual loss or damage. Therefore, it must be a question to be considered, whether the delay in performing the transportation service was a cause of damage.

On that subject, the sixth paragraph of the complaint alleges (*Rec.* 5):

> "That as the natural and proximate result of the drying and reconditioning of said wet silk, the colors of said silk became fixed and permanent and the silk otherwise damaged and the delivery of same at destination was greatly delayed."

According to that allegation, it was not delay that caused the damage, but, on the contrary, it was the damage, for which the carrier was not responsible, which caused the delay.

We very earnestly insist that this Court shall give consideration to the allegations of the complaint, which the trial court did not do.

The pleader, having chosen the words in which to express the precise charge made against the plaintiff in error, must be conclusively presumed to have intended the charge to mean what the words expressed. The charge here is, that the natural and proximate result of the drying and reconditioning is what caused the damage and delay. Then the question arises, who caused the drying and reconditioning? That refers us back to the fifth paragraph of the complaint in which it is experssly alleged (*Rec.* 4, 5) that "the plaintiff did cause said wet silk to be treated and reconditioned." Now, surely, by any rule of law or reason, can the carrier be held responsible for delay caused by the treating and reconditioning of the goods, which was done by the party complaining of the breach of the contract?

Responsibility for the treating and drying cannot be cast upon the carrier by the allegation in the

fifth paragraph that the treatment was as required and demanded. Requiring and demanding would not affect the responsibility, unless it was capricious and unreasonable, nor, if so, unless the existing circumstances and conditions were such that the requirement amounted to coercion. Now, there is no allegation charging the carrier with having exacted reconditioning that was unnecessary or unreasonable, nor that the plaintiff in the case caused the silk waste to be dried and reconditioned under stress of coercion constituting legal duress.

A result of a fair reading and interpretation of the complaint is, that it does not state facts sufficient to constitute a cause of action for breach of a contract, because the complaint does not specifically, nor by reasonable inferences therefrom, allege that the contracts sued on were broken by failure of the carrier to fully and completely perform the transportation service which the contracts required.

The complaint does not set forth the bill of lading contracts in the words and phrases thereof, but does describe the documents by numbers, dates, etc., sufficiently for identification, so that, for a clear understanding of the duties and obligations of the plaintiff in error thereunder, it is necessary to read them. They are in forms permitted by law in cases of contracts for through transportation from a foreign country to a destination point within the United States to be performed partly by ship and partly by a railway, and, they require the ship to deliver the 1,000 bales to the railway carrier *in good order.*

They are signed on the part of the ship carrier

as a principal contractor and as agent of the railway carrier, and are in two parts as distinct contracts, each containing distinct sets of terms and conditions—the first relating exclusively to the transportation by ship, and the second, to the land carriage, to begin when the goods should be delivered in apparent *good order* to the railway carrier, The two contracts are as distinct as they would be if contained in separate documents.

Liverpool, etc., Co. vs. *Phoenix Inc. Co.*, 129 U. S., 397, 463:

Pacific Mail Steamship Co. vs *Ry.*, 251 Fed. Rep., 218, 221:

C. N. O. & T. P. Ry. vs. *Fairbanks & Co.*, 90 Fed. Rep., 467; Rule 71 I. C. C., Tariff Circular 18-a.

The case is the same as if instead of a ship to bring the commodity to the place where the railway service was to begin, the shipper had employed a team to bring the bales from a distant place to that point. As in all contracts for future service made by an agent, the obligation of the railway carrier attached at the time of delivery to it of the goods, in the condition specified in the contract. In other words, a railway carrier having contracted to carry merchandise to be delivered to it *in good order* is not by such contract bound to carry the goods if delivered to it in bad condition, unless the same is first reconditiioned.

Paramore vs. *Ry.*, 53 Ga., 383;

Gulf, etc., Ry. vs. *Frank*, 48 S. W. Rep., 210 (Tex.);

Tilley vs. *Ry.*, 77 S. E. Rep., 994 (N C.)

There is no claim or pretense that the railway carrier is to any extent, or at all, responsible for any damage to the silk waste that happened before it was discharged from the "Canada Maru"; the railway carrier's contract, as it was pleaded, *was to receive the shipment—in apparent good order and condition*—carry it with reasonable despatch—and deliver it at destination "in like apparent good order and condition." By affirmative allegations of the complaint, in the fourth and fifth paragraphs thereof, it appears distinctively and positively that 133 of the bales were received, forwarded and delivered at destination *in due course,* and, the other 867 bales after being reconditioned by the defendant in error, were also carried to and delivered at destination; so that, the complaint itself shows affirmatively that the plaintiff in error did perform his duty stipulated for in the bill of lading contracts in every detail thereof, and no right of action accrued by any breach of either of said contracts.

The case is very simple: no labor to construe or interpret the contracts can be required; being ordinary bills of lading on blanks containing phrases and stipulations familiar to shippers and carriers and free from ambiguities, construction is not required nor permissible. By their express provisions they bar any recovery in two ways: *First,* negatively, in that they do not impose on the carrier a duty to transport silk waste while it is in a wet, heating, offensive and dangerous condition; and, *second,* affirmatively, in that the exemption from liability-for-delay clause therein means that no right to damages could accrue for delay during the time in which the goods were held in the shipper's possession for the purpose of restoring it to a con-

dition fit for transportation. There is no other contract to complicate the case.

The Court's findings of fact, numbered IX, X and XI (*Rec.* 39, 40, 41), are absolutely erroneous, for the reasons that the facts therein stated are not relevant to any issue tendered by the complaint, and all of the evidence on which said findings are based is, for that reason, void. Apparently it was assumed by the trial court that the allegations contained in the fourth paragraph of the complaint allege a supplementary contract. Whether such supplementary contract is so alleged requires that due consideration be given to the words of the pleading, which are as follows:

> That upon the arrival of the S. S. Canada Maru at Tacoma, Washington, during the month of August, 1918, the said bales of silk were discharged from the S. S. Canada Maru and delivered into the possession of the defendant for transportation to destination as aforesaid, under and in pursuance of the terms of the said bills of lading. That defendant accepted all of said silk for transportation and, in consideration of the freight prepaid to his agent, as aforesaid, and of further freight and charges to be paid by the plaintiff, the defendand agreed to transport the wet silk to destination by silk or passenger train service in refrigerator cars as aforesaid." (*Rec.* 4).

That allegation is too vague and indefinite upon which to base a finding that there was a supplemental agreement varying the conditions of the bills of lading. As so alleged, the allegations are inconsistent with each other, the idea of a new agreement being negatived by the statement that the 1,000 bales were delivered for transportation

"under and pursuance of the terms of the said bills of lading." It is not alleged, and it is not the fact, that there was any consideration paid, tendered or promised for the special service for transportation by silk or passenger train service or in refrigerator cars. Such supplemental agreement could not be made without violating Section 6 of the Interstate Commerce Law, which provides:

> "No carrier shall engage or participate in the transportation of passengers or property unless the rates, fares and charges upon which the same are transported by said carrier, have been filed and published in accordance with the provisions of this Act."

The allegation that defendant (plaintiff in error) accepted all of said silk for transportation, in consideration of the freight prepaid and of further freight and charges to be paid by the plaintiff (defendant in error), is insufficient to meet the requirements of law for a valid transportation contract, because the only freight and charges that could be lawfully made must be at the rates and under the conditions prescribed in tariffs on file with the Interstate Commerce Commission. To transport the silk in its wet and damaged condition would require special cars and a special service, which is forbidden by the Interstate Commerce Act. With respect to the service governed by the Act, the parties are not at liberty to alter the terms of the service as fixed by the tariffs in force. There was no tariff on file governing the shipment of such a commodity in such a condition. (See *Exhibits* 26 and 27 of plaintiff in error, the originals of which are on file, being the usual pamphlets filed with the Interstate Commerce Commission, identi-

fied and explained by the witness Brownell (*Rec.* 511 to 517). No carrier can extend any privileges or facilities save as have been duly specified in the tariffs.

Southern Ry. Co. vs. *Prescott*, 240 U. S., 632, 638.

Kirby's Case, 225 U. S. at page 166.

Robinson's Case, 233 U. S., 173, 181.

Southern Express Co. vs. *Byers*, 240 U. S., 612.

The introductory words of finding numbered X are:—"That after thus contracting for, and accepting, said 867 bales of waste silk for transportation as aforesaid,"

To express any meaning whatever, that finding should be corrected and tied on to some contract by the words "thus" and "aforesaid," but the only things in the nature of a contract that precedes, are the bills of lading, and they make no reference whatever to "wet waste silk." If, by the indulgence of imagination, the reference may be understood as adopting the finding numbered IX as if it were an assertion of the making of a contract, it takes us to "no one knows where," for that the ninth finding, instead of stating a contract, is only an imperfect recital of the testimony given by Mr. Taylor.

It appears that Mr. Taylor, acting as a representative of the underwriters and owners, after being informed directly by an officer having the authority of a General Freight Agent, that Mr. Earling, the General Manager, was the only man

who had authority, attempted to conclude an arrangement for special service with Mr. Cheney, who was a mere clerk in the Dock Office. See *Rec.,* pages 80 to 85.)

It is an elementary rule of law that whoever claims rights based on a contract made with an agent, has the burden of proving that the agent had authority to bind his principal in making the contract. There is not, in the testimony offered by the defendant in error, one scintilla of testimony or evidence in anywise tending to prove that Mr. Cheney had authority to bind the plaintiff in error by such a contract or arrangement as testified to by Mr. Taylor, and the evidence to the contrary is, that Mr. Earling, the General Manager, was the only representative of the plaintiff in error and that Taylor was so informed. (*Rec.* 82, 83).

Tilley vs. *Ry.,* 77 S. E. Rep., 994 (N. C.)

Gulf, etc. Ry. vs. *Frank,* 48 S. W. Rep., 210 (Tex);

chandise for transportation in an unfit or abnormal

Such a contract as the Court assumed in the findings above referred to, could not lawfully have been made, nor was it made by anyone authorized to bind the plaintiff in error thereby; and, finally, it was impractical, for reasons given in the testimony of James L. Brown, Superintendent of Transportation (*Rec.* 384 to 387).

The trial court erroneously assumed as a fact that Cheney held the position equivalent in authority to that of a railroad station agent, and erroneously held, as a matter of law, that acceptance at a railroad station, by the station agent, of merchandise for transportation in an unfit or abnormal condition, was equally binding upon the carrier, as

in any case of an ordinary shipment of goods in fit condition for transportation. But such authority cannot be inferred nor implied from the mere position of a railroad station agent.

Gauthier & Son vs. *Director General*, 115 Atl. Rep., 258 (Me.);

Warner vs. *Ry.*, 111 Me., 149.

It is marvelous that the parties who instituted this litigation could have conceived the idea of collecting damages from a railway carrier for an injury to merchandise in transit on board of an ocean carrier by maritime disaster which the Railway Company could never have guarded against or prevented, and for which even the ocean carrier was by law exempt from liability for damages. A bare statement of the proposition condemns such an idea, and for decision of this case the Court would not be justified in wandering far afield to conjure up a fanciful theory on which to base a decision as extraordinary as the idea which prompted the initiation of this case. The Court has only to read and understand accurately the complaint and the bill of lading contracts to find that the record discloses that, in rendering its judgment for the defendant in error, reversible error was committed.

The testimony of witnesses contained in the record described in detail the condition of the 867 bales on the arrival thereof at Tacoma. In his testimony, the witness *Charles Barker,* General Foreman for the Pacific Stevedore Company, superintending the unloading of the ship's cargo

when she docked at Tacoma (*Rec.* 396) stated, in substance, as follows:

That the ship's hold, under hatches No. 1 and No. 2, containing matting, tea, beans and peas and bales of waste silk, was practically full of water (*Rec.* 397). There was complaint while they were discharging the silk; in fact, all of the cargoes in the hatch were mixed up and the bags were bursting from the heat and the wet, and there was a complaint that they wanted to keep the water on them, so I went to the pump man and asked him if he would check his pumps and keep the water on, as the men were going to quit; I went and asked the men what was the matter and they said the bales and cargo was so warm that they could not handle it unless someone would keep the water up—to keep them from pumping the water out too fast. In fact, we went down in No. 2 and had a hose hole plugged at one time. There was a hole between No. 1 hatch and No. 2, which let the water run into the other hatch and we plugged it to keep the water up as high as we could while we were unloading it. The stench and fumes from the cargo was not very agreeable; it was a dirty smell. I know the bales were hot; they were smelling and steaming, of course, and smoking, but the men piled them on the dock (*Rec.* 400, 401). The heating of those bales was practically the same as I had previously had experience with in the heating of other commodities as a result of being wet. I presume the bales would have charred and possibly flamed, although I never saw anything flame. There undoubtedly was risk there, a hazard and a danger (*Rec.* 402). The men at work complained about the smell of the cargo when they

were down in the lower hold (*Rec.* 403) It was all bad, nasty work, being in the steam and the smell, etc. After we got down it stunk more. After we got to the water we did not have much complaint. The beans, rice, tea, mustard seed and other cargo in this hatch, was soaked with water. In fact, the sacks and the coverings had burst, so the stuff was all loose (*Rec.* 404). The grain was stored forward and the silk was stored in a separate section aft. It was all built up in the same hatch but stored in different places (*Rec.* 405).

F. L. Paggeot, Supercargo of the Osaka Shosen Kaisha, testified (*Rec.* 406):

I was in Tacoma when the "Canada Maru" came in with a hole stove in her side and the cargo damaged (*Rec.* 406). I recall the damage to the silk waste. I have to do with the fitness or unfitness of a cargo to be shipped. I recall when they unloaded the silk from the ship. When it came out of the ship it was steaming quite freely, but, on account of the water in the hold, I did not notice much heat. By "water in the hold," I mean the water came up from the damage in the bottom. The silk was all stowed from top to bottom in the after end of the hatch and the peas and bean were forward together. When they started to discharge the No. 1 hatch, the top was wet. There had been more water in there that had gradually gone out (*Rec.* 407, 408). When the cargo had been discharged and piled up there on the platform between the two docks, it was heating. The heat was not increasing, for the reason that they were playing water on it all the time. If it had been left to me, I would not have put it in the cars because it was wet and damaged. My idea was,

that it would catch fire (*Rec.* 408). There was a disagreeable smell all over the forward part of the ship and all over the dock. I noticed the bales which were loaded into two refrigerator cars. I went into the cars and examined them after the cars were opened the next morning. I put my hand on the bales. They were very hot before water was played on them (*Rec.* 409.)

James Ayton, shipper of grain and Cargo Surveyor for Lloyd's Agents at Seattle, testified (*Rec.* 411):

I have been looking after cargoes for pretty near 30 years on this Coast. I recall the "Canada Maru," which came into the dock in Tacoma with her cargo damaged. I surveyed some of the cargo of rice and stuff (*Rec.* 412). I was sent to Tacoma to survey a cargo of waste silk that was damaged that came out of the ship, to determine whether or not there was a risk in sending it forward in its then condition. I made an examination about the 23rd and 24th and made a report on the 26th of August (*Rec.* 413). I went over to Tacoma and met Mr. Cheney. He took me to the dock and showed the silk to me, as it was lying on the ground on some planks right between two docks. I went over those bales carefully with my hands, feeling of them, and I found them quite warm and steaming, and in some cases, where I put my hands down in, I found that some of the bales were quite hot; you could scarcely lay your hand upon them. I went all over the cargo in different places and put my hand down between, wherever I could, to feel, and I found 10 or 12 bales in that way that were quite hot. I came to the conclusion that it was a risky thing to ship

the bales. I should be scared that it would get on fire in transit. I made a report to my employer, Balfour, Guthrie & Company (*Rec.* 414). That report is Defendant's Identification No. 21. My signature is at the bottom. In making that examination, there was none of the railway officials following me around, or helping, or doing anything in connection with it; I did it all by myself. After the examination, I met Mr. Cheney, who asked me "what do you think of it?" I said "I consider that it would be a risk to ship" (*Rec.* 415).

David W. Huggins, Superintendent of L. C. Gillespie & Sons, Oil Importers, having an oil plant on the Milwaukee property between Docks No. 1 and No. 2, testified (*Rec.* 419):

I remember when the "Canada Maru" came in with a cargo of silk waste and other cargoes, damaged, in August, 1918. They unloaded the wet silk between my warehouse and what is known as Dock No. 1. There was just a six-inch fire wall separating them (*Rec.* 419). While it was there I became apprehensive with reference to its heating condition and its proximity to our own plant with the oil. I noticed that the wet silk stored there on an open dock was heating, and I feared that in time it might cause combustion, thereby endangering the stock I had in storage. I have in my lifetime experienced spontaneous combustion or heating from other materials—more particularly with corn and hay (*Rec.* 420). If there was enough heat there to char, in time it would cause it to combust, set fire to things that would be inflammable, in all probability. I examined the bales and inserted my hand in those bales (*Rec.* 421). They were

getting quite warm; so much so that anyone interested in anything else around there would feel that there was danger of fire (*Rec.* 422).

H. Meyer, in charge of what is known as the Pacific Oil Mills, the concern that dried the silk waste in August, 1918, for Mr. Taylor, testified (*Rec.* 426):

The silk waste came in box cars. I was there when the box cars were opened up. We had no great difficulty in getting it unloaded, except that the fumes and gases, arising from the bales fermenting in the cars, were so strong that the labor we had employed for the job refused to go in the cars, but our Foreman managed to get them out. The bales were smoking (*Rec.* 427). The laborers refused to go into the cars because the ammonia smell was so very strong (*Rec.* 433).

Joe Vice, working for the Chicago, Milwaukee & St. Paul Railway, in August, 1918, testifed (*Rec.* 434):

I was doing warehouse work. I helped to load it off the dock, or off the sand, into the box cars that transported the silk over to Seattle. That was on the 29th. The bales were so hot you could hardly hold your hands between them in the pile. I was working inside the car. It made us all sick (*Rec.* 435. It made me sick. It affected our eyes, burning them, and we loaded on a little while and I got so sick I couldn't stand it, so I got out of the car and quit working (*Rec.* 436).

Floyd Laycock, working for the Chicago, Milwaukee & St. Paul Railway Company at the docks, in August, 1918, testified (*Rec.* 437):

I was working with Joe Vice. The bales were rather warm to the hand; in fact, too warm to keep your hand on there for any length of time without it would burn. There was a very strong smell of ammonia and a stinking smell of vegetables or beans. It made me sick at my stomach; I had to vomit. It hurt my eyes also. I was unable to continue work and quit at the same time Mr. Vice quit (*Rec.* 438).

Pete Maybo testified (*Rec.* 440):

I was working for the Milwaukee road in August, 1918, with Joe Vice and Floyd Laycock, inside the box cars. My experience was that the bales were hot, steaming and smoking when we started to take the bales in by the platform and we could get the bales in the cars—they would drag it around with hooks, and when we would get the bale in we had to run out and get air. It affected me so that I started to throw up. It affected my eyes and face was burned (*Rec.* 440).

A. L. Groves, Superintendent of the Philippine Vegetable Oil Company at Tacoma Dock No. 1, testified (*Rec.* 391):

I recall when the "Canada Maru" came in with a lot of cargo damaged by sea water getting into it. They were unloading approximately 400 feet from our office. I recall the silk cargo which was being unloaded from the ship; I saw the first sling load coming up (*Rec.* 392). They started to put a load in their warehouse and then they stopped and put it on the open space between Dock No. 1 and the oil shed of Gillespie. I was on the ship every day that she was discharging. I know the men down in the hatches were complaining of the heat, after

they got down a little ways, and the smell. I certainly did notice the heat and the smell as it came out of the hatches, and after the cargo was discharged and piled up there on the platform, I noticed that it was heating (*Rec.* 393). I have seen hay that was not properly cured, a large stack, burn up by some overheating, and I have seen grain heat until it was charred. I would certainly not take the risk of sending anything forward that would spontaneously burn and char as I have seen other articles (*Rec.* 394). That is on account of my estimate that it would be a good chance for a fire. I would think so from the way the silk was heating when it was discharged and afterwards. I believed the silk placed in a tight car would be liable to heat and catch fire. When I saw the silk heating it was outside on the dock. It was hotter than I wanted to hold my hand on (*Rec.* 395).

F. J. Alleman, Freight Agent, in charge of the terminals and docks and head of the freight department in Tacoma, testifed (*Rec.* 335):

On August 10th, after the steamer had docked and started to discharge cargo, noticing the condition of the two forward hatches, I issued instructions that, under no circumstances, was any part of the damaged cargo to be accepted in the warehouse. It was to be placed in the open space between what is known as Dock No. 1 and the Gillespie Oil Shed. After I gave these orders, I watched the discharging for some little time and saw the condition on August 10th (*Rec.* 340). The steamer had to go to the dry dock, and when it came back from the dry dock and started to unload. I went down to observe it. That was sometime in the forenoon of August 12th. I noticed the condi-

tion of the cargo as it was coming out of the hold of the ship. The first was matting, tea, rice, beans and some silk waste. I went on the ship and looked in the hatches (*Rec.* 341). I was on the steamer a number of times on that particular day and I noticed that the water was only being pumped out sufficiently for the men to unload the slings and I noticed that the men were working in water and the wet cargo that it seemed to me could have been eliminated by pumping the water more rapidly, but I was informed at the time by the men in charge of the pump, that it was necessary to keep the cargo completely flooded due to the heat developing in the ship. I noticed that the bales as they were coming out were hot. The bales were somewhat warm, I would say, but not as warm as later on, due to the fact that they were thoroughly submerged in water (*Rec.* 343). I noticed the cargo generally, as it came out later on during the discharging. As soon as the cargo was exposed to the air, the water being pumped out, the cargo would heat. The beans and rice came out of the same hatch in which the silk was loaded (*Rec.* 343). I was again on the dock about an hour on the 13th and went about to examine the damaged cargoes that were being unloaded. I noticed the silk waste in the same manner that I did the other cargoes. They were all more or less heating on the platform (*Rec.* 344). I went back to the dock about 9 a. m. of the 14th. When I got to the dock on the morning of the 14th, I found two cars of this silk waste had been loaded. The doors had been opened prior to my arrival; they had been loaded on the previous afternoon and sealed up during the night (*Rec.* 345). They had been sprinkling the contents of both cars with water at the time that I arrived,

and, at this time, the fumes, steam and heat were still coming through the doors and through the vents of the two cars. I moved the bales to the side and got my hands on all sides of a number of bales. The heat was greatly intensified, and I felt that the heat was in excess of 135° Fahr. (*Rec.* 346). I immediately ordered the Foreman, Mr. Hennessey, to get hold of a switch engine and pull the cars away from the docks to an open space where, in case of fire, which I was afraid of, they would not endanger other property (*Rec.* 347). What made me feel there might be a fire result from the condition of these bales, was the fact that I have seen uncured hay, manure piles and grain, heat up to an extent where they would char, and, coming in contact with other foreign substances, create fires, and the heating of those bales did act similarly to the things I have described that charred and burnt other things. It so happened that Mr. Wilkinson was on the docks some time later on the same day (*Rec.* 348). We talked over the situation and Wilkinson agreed with me that the silk was dangerous and should not be forwarded, and we agreed between ourselves that the only authority that we would accept to forward the contents would be from Mr. Earling, the Vice President (*Rec.* 349). We decided that the dangers were so great that it would be entirely impracticable and wrong for us to endeavor to forward that cargo, unless it was authorized by the highest authority on the Coast of the Milwaukee Railroad Company, which was Mr. Earling. The unfitness of the silk was, that it was very obnoxious. Those conditions, to some extent, entered into our decision, but the prime factor I had in mind at all times was the danger to life and property due to fire (*Rec.* 350). We

were continually watering these cars or the contents until the 16th of August. On that day we unloaded them on the ground: we had difficulty in getting the men to handle the contents. They objected to the fumes and the heating and not so great at that time as later. This particular lot was kept wetted down every day until it was unloaded (*Rec.* 351). The bales were piled on the open platform between Dock No. 1 and the Gillespie Oil Shed. There were several industries in that vicinity. That particular oil shed was operated by Gillespie & Sons. They were afraid of fire (*Rec.* 352). The bales remained on that open platform until August 29th and were sprinkled with water daily, continually kept soaking it with fresh water (*Rec.* 353). I noticed that the bales were still heating, but not to the same degree that it did the first ten days (*Rec.* 354). On August 29th Mr. Taylor authorized or ordered us to load the bales into box cars for shipment to the North Pacific Sea Products Company located in Tacoma. We started to load into the cars at that time. The gang started to load two of the cars from the ground that had previously been loaded into the refrigerator cars, and after loading perhaps less than one-third of one car, the men began to get sick and finally they refused to work—that particular gang did—and we then persuaded another gang, by allowing them some extra time, to finish the loading of those two cars (*Rec.* 355). They had the same difficulty: not quite so much as the first gang. The extreme ammonia fumes and the heat that still remained in the cars made the men sick. I did not note the heating of the bales while they were being loaded into cars for this shipment ordered by Mr. Taylor. The bales were still very

hot, although not as hot as they were at the time they were unloaded from the two refrigerator cars. They had been kept wet and in the open air (*Rec.* 356). In my younger days, up to the time I was about 21 years of age, I was raised on a farm and I have at different times seen improperly cured hay heat up to such an extent that it had charred the entire inside and, whenever the air reached such stacks, it would blaze out. I have seen that many a time, and the heating of the contents of those two cars acted in a similar manner (*Rec.* 357).

All the testimony as to the offensive condition of the silk waste is further corroborated by the testimony of witnesses for the defendant in error as to the condition of the silk waste after its delivery at Providence.

Edgar W. Lownes, president of the American Silk Spinning Company, defendant in error, in his deposition stated that when the silk waste arrived the outside had colored, but he could not say as to the inside (*Rec.* 133). "It did not come in bales. It came in a large matted mass like manure, smelt very strong and I didn't want to handle it very much myself" (*Rec.* 134).

Theodore Bellinger, manager of the silk mills at Whitehall and Brooklyn, New York, testified in his deposition, referring to the silk waste in question, that he saw samples sent to Whitehall and afterwards was present at the auction held in New York and saw the goods in the warehouse and knew their condition. He stated that "The samples on exhibition there in the basement of the building were still, some of them, quite damp. The stock was very dark in color, and in our estimation

had been very much weakened. Some of it was discharging a very bad odor the morning we saw it there" (*Rec.* 163).

Charles E. Burling, the auctioneer who sold the goods in New York, in his deposition, answering a question as to the physical condition of the silk, testified: "In very bad shape, wet and tangled—it was assumed there were 867 bales, but no mortal man could tell whether there were 8,000 or 800—I will modify that, no mortal man could possibly tell how many there were. The bales were all broken, the worst, almost, I ever saw; we had to get some outside help, our men would not handle it, absolutely refused because of the odor and the difficulty. The condition was so bad that it would take 2, 3 or 4 men 15 minutes to half an hour to unwind a long skein, pull it out, otherwise you would have to cut it; it was so badly tangled they had great difficulty in handling it and then the odor drove away most of the buyers as well as the laborers" (*Rec.* 167-8).

While a carrier is generally required to accept for carriage all freight properly packed and delivered to him in suitable condition for transportation, he is not required to accept for shipment *any* freight which may be tendered. *If a carrier believes* that an article tendered him for transportation would be injurious to the public health or is likely to destroy the property of others or that it cannot by reason of its condition be safely transported, he has the right to decline to receive the shipment. Especially so as in this case, in which the railroad men in charge of the business *did believe* by reason of the obviously bad condition of the silk waste that there would be danger of spon-

taneous burning or ignition during transit on a long journey, which belief was shared in by others experienced in railroad transportation, and also confirmed by the testimony of expert witnesses in the case, that is, men having scientific knowledge as to the likelihood of such a commodity as silk waste in bales in carload lot quantities loaded in closed cars and heating as a consequence of being submerged in water, generating sufficient heat to culminate in spontaneous burning. Such expert evidence is in the record—the testimony of Mr. William D. Richardson, for twenty years chief chemist for Swift & Co. of Chicago (*Rec.* 441); Mr. C. P. Beistle, the chief chemist to the Bureau of Explosives, which is an organization of the railroads, steamship lines and express companies to promote the safety of transportation of explosives and other dangerous articles, and directly connected with the Interstate Commerce Commission (*Rec.* 473); and Mr. H. K. Benson, professor of chemical engineering and head of the department of chemistry of the University of the State of Washington (*Rec.* 494).

This identical proposition became crystallized into law by Interstate Commerce rules, formulated, promulgated and published on July 15, ~~1819~~, contained in *Exhibit* 35, page 41, Rule 1801, Subdivision (d) as follows:

> "The following are forbidden articles for transportation:
>
> "Rags or cotton waste oily with more than 5 per cent of vegetable or animal oil, *or wet rags, or wet textile waste,* or wet paper stock."

And Rule 1803, on page 42 of *Exhibit* 25:

> "This group includes all substances other than those classified as explosives, that are

liable, under conditions incident to transportation, to cause fires by self-ignition through friction, through absorption of moisture, or through spontaneous chemical changes."

And, on page 58, Rule 1838, Subdivision (a):

"Unless the preparation and nature of fibers or fabrics impregnated or saturated with animal or vegetable oils is such as to prevent all spontaneous heating in transit, such materials must be placed in hermetically sealed, metal-lined wooden boxes or crates,"

And

Subdivision (c):—"Rags, rag dust, waste wool, hair *and other textile wastes,* must not be offered for shipment except when bagged, baled or in other packages *and not when wet.* Waste paper or paper stock must not be offered for shipment when wet."

The definition of "textile," in a commercial sense, is:—"Cotton, woolen, linen, silk or laces which is, or may be, woven—a fabric made by weaving." This implies that the material for weaving is in a raw and not a finished state.

Wood vs. *Allen*, 111 Iowa; 82 N. W. Rep. 451.

QUESTION OF OWNERSHIP

We come now to the *fifth* question for discussion, viz.: whether or not the defendant in error owned the silk and by reason of the ownership of the goods, acquired or ever had any right of action arising out of the contract sued on. Or, stated conversely, did any right of action for damages accrue to the American Silk Spinning Company?

The claim of that corporation is based upon its assumption of a right of *absolute* ownership of 867 bales of damaged silk waste. Its claim is for damages for a breach of a carrier's contract.

At the very outset it is to be noted that the American Silk Spinning Company is not a party to the bill of lading contracts. It is not so named, nor was it the consignee of the merchandise to whom bills of lading were issued and delivered by the initial carrier or agent of the plaintiff in error.

The evidence setting forth the facts regarding the relationship of that corporation to the property that was damaged in transit is contained in the deposition of Edgar W. Lownes, president of that corporation (*Rec.* 127) wherein his testimony on cross examination is of the following tenor:

CROSS-EXAMINATION BY MR. KORTE

"78 Q. This shipment moved on bills of lading with a draft attached?

A. No, no draft attached.

79 Q. It was an order bill of lading?

A. Letter of credit.

80 Q. Well, whatever it was, it had to be taken up somewhere?

A. The payment had been taken up.

81 Q. And the letter of credit, what we call a draft, came on?

A. No, never came on. Assigned to the bank and endorsed over to us.

82 Q. And you paid it then.

A. No. That was bought on a four months letter of credit. The shipment is made from China addressed to the bank with a four months letter of credit. That isn't due until four months after the shipment is made. The bankers give us the bills of lading on a trust receipt

from us guaranteeing that if we use the silk and sell it the silk belongs to them until it is paid for.

83 Q. When did you make that payment?

A. Four months after the date of shipment, or practically four months.

84 Q. And that payment, of course, was made to the bankers?

A. Yes, when it was due.

85 Q. The bankers named in the bills of lading who endorsed them over to you?

A. Yes. They advanced the money to the Chinamen."

By stipulation (*Rec.* 193), Mr. Lownes' testimony was deemed to be supplemented as if he had testified "that he received the four bills of lading with the endorsements as shown on the bills of lading, on the 7th day of August, 1918."

That testimony, in connection with what appears by the endorsements on the bill of lading documents, is all of the testimony relating to ownership of the silk by the defendant in error.

These are order bills of lading, each of which in terms provides that "the surrender of this bill of lading properly endorsed shall be required before delivery of the property."

The silk waste was damaged in transit by the marine disaster on the 30th day of July. The bills of lading were endorsed, according to the testimony of Lownes, per the stipulation, on the 7th day of August, and, according to his testimony in his desposition, the delivery of the bills of lading so endorsed did not transfer the title to the goods, because he states "the bankers give us the bills of lading on a trust receipt from us guaranteeing

that if we use the silk and sell it the silk belongs to them until it is paid for" (*Rec.* 128); and the payment was made to the bankers when it became due, that is four months after the date of the shipment from Hong Kong, China. As to that date it must be assumed that the shipment date was the same as the the bills of lading, the last of which was on the 24th day of June; so that the due date and the payment was made on the 24th day of October, 1918. Until that date the American Silk Spinning Company was not the owner and no right of action accrued to it by virtue of its ownership of the goods prior to that date. Prior to that date the 867 bales had been submerged in sea water, transportation thereof by the railroad carrier in that condition had been refused, a representative of the underwriters and owners had taken posession and submitted the goods to the process of drying, which by the allegations of the complaint caused the damage complained of.

By provisions of the Interstate Commerce Law relating to bills of lading, now grouped and codified in U. S. Compiled Statutes, Compact Edition, Secs. 8604a *et seq.*, such documents are contracts and also muniments of title, so that the title to the goods vests in the party having the right to transfer the same by endorsement of the documents. They are negotiable instruments so that the carrier is bound to make delivery of the goods to the holder of the bills of lading properly endorsed.

Russo-Chinese Bank vs. *National Bank of Commerce of Seattle*, 241 U. S., 403.

In that case the Supreme Court, referring to a bill of lading for a cargo of flour, said: "The bill of lading endorsed in blank represented the flour."

Inasmuch as the American Silk Spinning Company was not the owner of the merchandise at the time it was injured a right of action for the injury was not acquired by it as an incident to the title subsequently acquired. The rule is that when a right of action for damages accrues, it is a personal right and not an incident or appurtenance of the property.

In the case of *Northern Pacific Railway Co.* vs. *Murray,* 87 Fed. Rep., 648, this court reversed a judgment in favor of a land owner for damages for the unauthorized taking of land by a railway company for use as its right of way; the sole reason for reversing the judgment being that the plaintiff was not the owner of the land when the railroad company took it. The court held that the right of action did not pass to the vendee as if it were a right running with the land.

That decision was grounded upon the authority of *Roberts* vs. *Railroad Co.,* 158 U. S., 1, in which the Supreme Court said:

> "It is well settled that where a railroad company having the power of eminent domain, has entered into actual possession of the land necessary for its corporate purposes, whether with or without the consent of the owner of such land, a subsequent vendee of the latter takes the land subject to the burden of the railroad; and the right to payment from the railroad, if it entered by virtue of an agreement to pay, or to damages, if the entry was unauthorized, belongs to the owner at the time the railroad company took possession."

And stating further, after citation of cases:

> "Numerous authorities to the same effect

> may be found collected in *Woods on Railroads,* Vol. 2, page 994, and the conclusion established by the decisions is there said to be that the damages belong to the owner at the time of the taking, and do not pass to a grantee to the land under a deed made subsequent to that time, unless expressly conveyed therein."

The same ruling was made by the District Court for Oregon in the case of *Eastern Oregon Land Co.* vs. *DeChutes R. Co.,* 213 Fed. Rep., 897.

It was held that a right of action for damages does not pass with the transfer of title to the damaged property, in the case of *Bennett* vs. *Dickenson,* 190 Pac., 757 (Kan.).

See also *Alabama Railway* vs. *Mt. Vernon,* 4 So. Rep., 356 (Alabama).

Bankers' letters of credit are a convenience in mercantile transactions where vendors part with possession by shipment to purchasers at a distance on credit, the effect being that the vendor gives credit to the banker issuing such document, and bills of lading for the shipment issued to the banker or to his order convey absolute title to the goods, entitling him to all of the rights of an owner until the buyer for whose benefit the letter of credit was given, pays the purchase price due to the bank.

In the case of *Moore* vs. *Bird,* a Massachusetts case, 77 N. E. Rep., 643, the law is stated in the syllabus as follows:

> "Where bankers issued mercantile letters of credit to merchants under an agreement that goods purchased by means of the credit, as well as bills of lading of such goods, should be held by the bankers for security pursuant to which agreement the bills of lading were

made out to the order of the bankers and sent directly to them by the sellers of the goods, the bankers acquired title to the goods."

In the case of *Moors* vs. *Drury*, another Masschusetts case, reported in 71 N. E. Rep., 810, the court held that where merchandise is imported under letters of credit issued to the importer under an agreement that the bills of lading shall be made to their order and that the consular invoice shall be sent to them, and the merchandise is consigned to them, and they retain title until it is sold in their name, and by the course of dealing between them and the importer they pay to him the surplus of the proceeds, after deducting therefrom the amount of their advances, commissions, duties and custom house brokers' charges, they are the owners of the merchandise, and not mortgagees or pledgees.

The rule of law thus announced by the Massachusetts court is also the rule of law in such cases in the federal courts.

In the case of *Century Throwing Co.* vs. *Muller,* 197 Fed., 252 (3rd C. C. A.), the Century Throwing Company, wishing to purchase raw silk in Japan, arranged that the shipment should be made on the basis of a six months sight draft drawn against the silk, guaranteed by a bankers' letter of credit which was issued by the defendant in error, bankers in New York, Relying upon the guarantee by the bankers, as set forth in the letter of credit, the silk was shipped to New York on a *bill of lading in the name of the bankers,* and deliverable upon their order. The duplicate bills of lading, with a consular invoice, were sent directly to the bankers, and in due course were received by them, as was also the original bill of lading with the draft attached. On arrival of the goods in New

York, and on the same day, the bankers, endorsed the bill of lading and delivered it to the president of the Silk Company, receiving from him at the same time a *trust receipt,* signed on behalf of his company, which receipt retained the title to the silk in the bankers who issued the letter of credit. Upon these facts, the Circuit Court of Appeals held that the title to the silk was in the bankers.

The opinion in that case by Judge Gray, shows great care in the consideration of the law applicable to facts exactly like the facts of the case at bar. Wide research is shown by the many decisions of high authority cited therein, quoted from and commented upon, including the decision of this Court in *Merchants Bank* vs. *McGraw,* 76 Fed., 930.

The trial court, instead of making findings according to its own understanding of the evidence, merely adopted and signed a complete set of findings prepared by counsel for the defendant in error, which are partial and unfair. This is especially manifest in paragraph VI of the findings (*Rec.* 38), which recites the transfer of the bills of lading without mentioning the important fact that the defendant in error gave, in exchange for those documents, trust receipts, guaranteeing that the goods should remain the property of the bankers until paid for. The finding, as the court adopted it, means, that by the endorsement and delivery of the bills of lading the title to the goods passed to the defendant in error, although, by the testimony of the president of that corporation, it was guaranteed by an instrument in writing that the title did not then pass, but remained vested in the bankers until payment, and the payment was made when the letter of credit came due, which, as above shown, was several months later.

Damages.

The measure of damages, if there were liability therefor, ought to have reference to the amount of the actual impairment of value of the goods, which, by the evidence in this case, including the samples which are exhibits of the goods after the process of reconditioning, establishes that the actual intrinsic value was diminished in only a small degree. The silk waste, although discolored by the sea water, was, on delivery at Providence, in demand and usable, and, for the purpose for which it was intended—that is, for making powder and cartridge bags for the Government—the value was impaired but little if at all (*Rec.* 536 to 550). But the view of the case most favorable to the defendant in error would be to assume the measure of damages to be the difference in market value of the goods in an undamaged condition and the market value of the goods as they were when delivered at Providence. It was by assuming that to be the legal measure of damages that the court in its findings fixed the amount, and that was done by a computation of the market price of silk waste as given in the deposition of Edgar W. Lownes, stating the different prices of Canton silk waste of the grades numbered 1 and 2, and it was assumed that 500 of the 867 bales were of grade No. 1, having a higher market value than grade No. 2. By that method of computation, the amount of damages awarded was fixed at $105,622.90. There is nothing in the testimony to warrant the court in fixing the number of the higher grade and more valuable bales at 500; the only scintilla of evidence bearing on that precise point is in the deposition of Mr. Lownes, who had no information on which

to determine the number of bales of the different grades. That is so, because in his own words (*Rec.* 134) "it did not come in bales; it came in a large matted mass like manure."

We deem it not worth while to discuss the differences between the testimony of Mr. Lownes and witnesses for the plaintiff in error with respect to market values, and it is unnecessary to do so, because Mr. Lownes was the only witness who testified for the defendant in error as to the amount of damages in dollars and cents, and he fixed the total value of 867 bales, after being wet by sea water, on arrival at Providence, at $113,088.40 (*Rec.* 126, 127), that amount being ten per cent less than the market value of the silk waste if it had been undamaged, and he conceded that a ten per sent discount would have to be allowed as against full value. The evidence on the side of the defendant in error, which is not disputed, is, that the net proceeds from 867 bales that were sold at auction in New York amounted to $14,815.67 (*Rec.* 167). Subtracting the net proceeds of the auction sale from the total value as testified by Mr. Lownes, the balance, which would represent the actual damage, amounted to $98,272.73. Those figures represent the highest amount of damages which could be legally awarded against a wrong-doer legally liable for the damage. If the plaintiff in error were liable at all, he would be entitled, by the stipulation in the bill of lading contracts, to the full benefit of the insurance effected. Now the receipts given to the Atlantic Mutual Insurance Company (*Plaintiff' Ex.* 29; *Rec.* 661) show that the defendant in error received from the insurer

a total amount of $102,052.96, which covers the total amount that may be assumed as the actual loss on the goods, with a liberal margin for interest. The plaintiff in error is legally entitled to the benefit of that insurance money, because it is written in the bill of lading contracts. That such a stipulation in a carrier's contract is valid and binding upon the parties to the contract, has been definitely estalished by repeated decisions of the Supreme Court of the United States.

Inman vs. *Ry.,* 159 Fed. Rep., 960, 973.

Phoenix Ins. Co. vs. *Ry.,* 117 U. S., 312.

Wager vs. *Providence Ins. Co.,* 150 U. S., 99.

Mobile & M. Ry. Co. vs. *Jurey,* 111 U. S., 584, 593.

The latest desicion by the Supreme Court is in the case of *Luckenbach* vs. *McCahan Sugar Refining Co.,* 248 U. S., 139. In that case the opinion, referring to a similar clause in the bill of lading contract, said:

> "Such clause is valid, because the carrier might himself have insured against the loss, even though occasioned by his own negligence; and if a shipper, under a bill of lading containing this provision, effects insurance and is paid the full amount of his loss, neither he nor the insurer can recover against the carrier."

There are other authorities, but the decisions of the Supreme Court are conclusive and binding upon this Court, and, if for no other reason, that clause in the contract must constrain this Court to reverse

the decision of the District Court and order the action dismissed.

Our last assignment of error is on the ground that the findings are insufficient to support the judgment. That is because there is no finding by the court that the bill of lading contract has been breached. The judgment rests upon findings numbered IX, X and XI, which contain no reference to the contract and do not find that there was any supplemental or substituted contract. In lieu of a contract, the ninth finding recites substantially Mr. Taylor's testimony with respect to his conversations with Cheney, the clerk. It is unthinkable that this Court can affirm a judgment having no other foundation than a conversation between these two men. *In the first place, Mr. Taylor does not show that he had any authority to make a contract for the defendant in error. All that he says in his testimony is, that he acted as a representative of the underwriter and owners, without attempting to identify the owners.* In the second place, Cheney had no authority to make a contract, and, if they were both fully authorized, what they said to each other did not culminate in a contract. Were the Court to make an attempt to establish a contract out of that testimony, it would be unable to find authority therefor coming from either party, or to state the terms agreed to, or what, if any, consideration was to pass from one to the other. We wish the Court to especially take note of the fact that *Taylor did not promise anything to Cheney.* The only offer he appears to

have made was in a conversation with Barkley, which was, to pay the expense merely of one or two men to travel with the shipment to see that the wetting and icing were properly attended to.

Respectfully submitted,

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No. 3845

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES C. DAVIS, as DIRECTOR GENERAL OF RAILROADS, operating the Chicago, Milwaukee & St. Paul Railway and AGENT appointed under the Transportation Act of 1920,

Plaintiff in Error,

vs.

AMERICAN SILK SPINNING COMPANY, a corporation,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF DEFENDANT IN ERROR

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BRIEF OF DEFENDANT IN ERROR

This is an action at law to recover damages for breach of a contract of carriage. The complaint is set forth at length in the transcript of record. (Rec. pp. 1-6). To the complaint an Answer was filed. (Rec. pp. 7-17). To the Answer a Reply was filed. (Rec. pp. 18-22).

The parties entered into a written stipulation

waiving a jury and agreeing to submit the case to the court without the intervention of a jury. (Rec. p. 24). At the conclusion of the trial, which lasted several days, both parties requested the court to make certain findings of fact and conclusions of law. The court, after deliberating upon the matter some time, made certain findings of fact and conclusions which are set forth in full in the transcript of record (Rec. pp. 25-34) and thereafter on December 15, 1921, the court signed the judgment in the case in favor of plaintiff (Rec. pp. 72-73). The plaintiff in error (defendant below) filed a bill of exceptions and prosecuted a writ of error to this court. The plaintiff in error has made 34 assignments of error, which are set forth in the transcript of record. (Rec. pp. 590-614).

The defendant in error believes certain of these assignments of error are unavailing to plaintiff in error on appeal to this court for the reasons hereinafter noted.

The Judicial Code (*R. S. Sec.* 649) *U. S. Compiled Stats.* 1916, *Sec.* 1587, makes provision for the trial of issues of fact by the court, as follows:

"Issues of fact in civil cases, in any circuit court, may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The findings of the court, which may be either general

or special, shall have the same effect as the verdict of a jury."

The provision of this section became inoperative as to the circuit courts on the abolition of these courts by the *Judicial Code*, *Sec.* 289, *U. S. Compiled Stats.* 1916, *Sec.* 1266, (*Act of March* 3, 1911), but were made applicable to the district courts by the transfer of the powers and duties of the circuit courts to the district courts by *Sec.* 291 *of the Judicial Code* (*Act of March* 3, 1911) *U. S. Compiled Stats.* 1916, *Sec.* 1268.

The Judicial Code makes provision for the review of cases tried by district courts without the intervention of a jury (*R. S. Sec.* 700) *U. S. Comiled Stats.* 1916, *Sec.* 1668. This section became inoperative as to trials in the circuit courts upon the abolition of those courts by *Sec.* 289 *of the Judicial Code*, (*U. S. Compiled Stats. Sec.* 1266), but were made applicable to the district courts by the transfer of the powers and duties of the circuit courts to the district courts by *Sec.* 291 *of the Judicial Code* (*Sec.* 1268 *U. S. Compiled Stats.* 1916).

By the provisions of the Judicial Code last above mentioned, the questions which may be reviewed by this court upon a writ of error are particularly specified and limited to rulings of the court in the progress of the trial, if excepted to

at the time and duly presented by a bill of exceptions, and in the event special findings be made by the trial court, the review of this court may extend to the determination of the sufficiency of the facts found to support the judgment.

Probably no other provision of the Judicial Code has been more frequently passed upon by circuit courts of appeal than the provisions of the section last above noted. If the statute is not clear in itself, then the decisions of the courts in which these provisions have been considered have made them clear. This court has several times passed upon these provisions and by its decisions has clearly pointed out what questions it will or will not pass upon in an appeal such as this.

Before referring to these decisions we deem it in order to point out the nature and character of the assignments of error which the plaintiff in error requests this court to consider. These assignments of error may be grouped as follows:

Group One. Error in admitting testimony. Into this group falls Assignment of Error No. 1, which is to the effect that the trial court erred in admitting in evidence the answer of Arthur D. Little to three certain questions asked him, the answer of Edward A. Barrier to two certain questions asked him, and the answer of Harry Albert Mereness to one

certain question asked him. These men were all witnesses for the plaintiff below and the questions asked them, as above noted, were propounded by plaintiff's attorney.

Group Two. Into this group fall Assignments of Error Nos. II to XIII, both inclusive, all of which are to the effect that the trial court erred in refusing to make certain findings of fact therein noted and requested by the defendant to the action.

Group Three. Into this group fall Assignments of Errors Nos. XIV to XVI, both inclusive, which are to the effect that the trial court erred in refusing to make certain conclusions of law requested by the defendant to the action.

Group Four. Into this group fall Assignments of Error Nos. XVII to XXIX, both inclusive, which are to the effect that the trial court erred in making certain findings of facts as therein noted. (Rec. pp. 605-612).

Group Five. Into this group fall Assignments of Error Nos. XXX to XXXIV, both inclusive, which are to the effect that the trial court erred in making certain conclusions of law therein noted and in rendering judgment against the defendant for the reason that the findings of fact as made and signed by the court are insufficient to justify the

conclusions of law and insufficient to support the judgment. (Rec. pp. 612-613).

WHAT QUESTIONS MAY BE REVIEWED BY THIS COURT IN THIS CASE

Except for the provisions of the Judicial Code expressly authorizing it, the district courts would have no jurisdiction to try a civil cause without the intervention of a jury. The code permits such a trial whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury, and provides that in a case so tried "the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." (R. S. Sec. 649, U. S. Compiled Stats. 1916, Sec. 1587). Hence, it is clear that such a trial is not one which a party is entitled to have as a matter of right. Such a trial can be had only by virtue of the statute and upon strict compliance with its terms.

The statute, with equal clearness and strictness, defines what questions may be reviewed by this court on an appeal upon a writ of error growing out of such a trial. The statute provides that "the rulings of the court in the progress of the trial of the cause, if excepted to at the time and duly presented by a bill of exceptions, may be re-

viewed upon a writ of error and when the findings of the trial court is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment of the trial court." *R. S.* 700, *U. S. Compiled Stats.* 1916, *Sec.* 1668. The United States Supreme Court, in the case hereafter noted, has expressly held this statute to be a limitation upon its revisory power upon a writ of error in such cases, and this court and other circuit courts of appeal in the cases hereinafter noted have adhered to and followed the holding of the Supreme Court.

In the case of,

Stanley v. Board of Supervisors, 121 U. S. 535, 547, 30 L. Ed. 1000.

the court said:

"Several of the assignments of error presented for our consideration are to rulings of the court below upon the evidence before it; to its finding of particular facts; and to its refusal to find other facts. Such rulings are not open to review here; they can be considered only by the court below. Where a case is tried by a court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the argument that upon the evidence the findings should have been different. * * * * And the first assignment of error is that the court erred in deciding that the plaintiff failed to establish the allegations mentioned, and the greater part of the oral argument of the plaintiff's counsel and of his printed brief was devoted to the maintenance of this proposition; which

is nothing more than that the court below found against the evidence—a question not open to review or consideration in this court. Only rulings upon matters of law when properly presented in a bill of exceptions can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment rendered. This limitation upon our revisory power on a writ of error in such cases is by express statutory enactment. * * * The same answer will apply to the exceptions taken to the refusal of the court to make certain additional findings. If error was thus committed, it was in not giving sufficient weight to the evidence offered—a matter determinable only in the court below."

In the case of,

Sayward v. Dexter Horton & Co. 72 Fed. 758.

this court, referring to the provisions of the Judicial Code above noted, said:

"Several of the assignments of error bring in question the sufficiency of the evidence to establish the findings of fact made by the referee and adopted by the court. It is not contended, nor does it appear, that there was absolutely no evidence upon which to base those findings. The contention is that, upon the evidence adduced, the findings should have been different. That contention can not be considered in this court. * * * Under these statutes and the established construction given them by the courts, the power of this court is limited to the determination of the question whether errors were committed by the trial court in its rulings during the progress of the trial, and whether the special findings made by the court were sufficient to support the judgment."

This court then, in support of its decision above noted, cites numerous decisions of the U. S. Supreme Court.

Again in the case of,

> *Empire State-Idaho Mining & Developing Co. v. Bunker Hill & Sullivan Mining & Concentrating Co.* 114 Fed. 417, 52 C. C. A. 219.

this court, in passing upon the question, after stating that the case was tried without a jury and resulted in certain findings of facts made by the court, and a judgment thereon in favor of the plaintiff, said:

"The record contains a bill of exceptions embracing, among other things, various assignments of error, the 2nd, 3rd, 4th and 5th of which are to the effect that the trial court erred in making certain of its findings of fact, which findings of fact so complained of these assignments of error respectively set out at large. The 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, and 20th assignments of error are to the effect that the court below erred in refusing to make certain findings of fact requested by the defendant to the action. *It is very clear that these assignments are unavailing.* Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive in the appellate court. Only rulings upon matters of law, when properly presented in a bill of exceptions, can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment rendered. (Here this court cites certain cases, including *Stanley v. Supervisors, supra*).

The remaining assignments of error embodied in the record relate to the question of the sufficiency of the findings of fact made by the court below to sustain the judgment given by it, which is the real, and, indeed, the only, question in the case."

In the case of,

Los Angeles Gas & Electric Corp. v. Western Gas Const. Co. 205 Fed. 707.

this court again had occasion to, and did pass upon the precise question here under consideration, and expressly held, following its former decisions in the case of *Empire State v. Bunker Hill, supra*, that this court could not and would not consider assignments of error to the effect that the court below erred in refusing to make certain findings of fact requested by the defendant or that the court below erred in making the findings of fact which it did make.

Plaintiff in error devotes the first six pages of its brief to its "Statement of the Case," and on pp. 6 to 10 of its brief may be found its "Statement of Issues." On pp. 10 and 11 of its brief may be found what it terms "Questions for Decision." On p. 11, it is stated "The plaintiff in error relies upon and will discuss all of the Assignments of Error which are as follows," which statement is followed by its "Assignments of Error" set forth in full on pages 11 to 32.

We have heretofore in this brief endeavored to classify into proper groups the thirty-four Assignments of Error upon which plaintiff in error states it relies, and all of which assignments plaintiff in error states it will discuss. A careful reading of the brief of plaintiff in error has not disclosed to us any argument whatever therein as to certain of these assignments, and such assignments as are discussed, are not discussed either in the order in which they are made, or in groups.

It is posible that the failure of the plaintiff in error to discuss numerous of its assignments of error may be considered a concession on the part of plaintiff in error that the questions raised by such assignments are not subject to review by this court.

Since the Assignments of Error logically fall into groups, as hereinbefore noted, we will endeavor to so discuss them.

GROUP I

Into this group falls Assignment of Error No. 1, which is to the effect that the trial court erred in admitting in evidence the answers of certain witnesses for plaintiff below to certain question propounded to them, as hereinafter noted.

Assignment of Error No. 1 is found on pp. 11

to 16 of the brief of plaintiff in error, in which brief there is not, so far as we have been able to discover, any argument whatsoever in support of said assignment. We are, therefore, led to the belief that plaintiff in error has concluded the question raised by its Assignment of Error No. 1 cannot, as a matter of law, be reviewed by this court, or, if reviewable, that there is not sufficient merit in it to warrant an argument, hence we will treat this assignment as having been waived by plaintiff in error. A casual reading of the questions and answers referred to in the assignment is sufficient, we think, to convince this court that the questions were proper ones to be propounded to experts and that the answers thereto constitute competent evidence.

GROUP II

Into this group fall Assignments of Error Nos. 2 to 13, inclusive, (see brief of plaintiff in error pp. 17 to 28) (Rec. pp. 596 to 604) all of which are to the effect that the trial court erred in refusing to make certain findings of fact therein noted, and requested by the defendant to the action. We do not find in the brief of the plaintiff in error any argument directed to the Assignments included in this group.

We have previously herein directed the attention of this court to the following cases:

Stanley v. Board of Supervisors, 121 U. S. 535, 547, 30 L. Ed. 1000.

Sayward v. Dexter Horton & Co. 72 Fed. 758.

Empire State Co. v. Bunker Hill Co. 114 Fed. 417, 52 C. C. A. 219.

Los Angeles Gas Co. v. Western Gas Co., 205 Fed. 707.

The decisions in the three cases last mentioned were rendered by this court. The decision of the U. S. Supreme Court in the *Stanley* case is squarely in point, as are the above noted decisions of this court. In language as clear as words can make it, these decisions say that assignments of error based upon the refusal of the trial court to make findings of particular facts are not open to review in this court, and it matters not how convincing the argument may be that upon the evidence the findings of the trial court should have been different.

We, therefore, pass without further argument all questions raised by Assignments of Error Nos. 2 to 13, inclusive, for the reason that such questions are not subject to review by this court.

GROUP III

Into this group fall Assignments of Error Nos. XIV, XV, and XVI. (brief of plaintiff in error p. 24) (Rec. pp. 604, 605) which are to the effect that the trial court erred in refusing to make certain

conclusions of law requested by the defendant to the action. The requested conclusions of law were as follows:

A. "The plaintiff herein is not the real party in interest, nor entitled by law to maintain this action," and

B. "The defendant is not, by any act or omission, guilty of any breach whatever of the contract sued on herein," and

C. "The defendant is entitled to have a judgment in its favor that the plaintiff take nothing by its action herein."

These conclusions of law, which plaintiff in error requested the court to make, are directly opposite to the conclusions of law which the court did make. Plaintiff in error excepted to the conclusions of law which the trial court did make, and its Assignments of Error Nos.XXX to XXXIV, which we have heretofore classified as falling in Group Five, are to the effect that the trial court erred in making the conclusions of law which it did make, and in rendering judgment against the defendant for the reason that the findings of fact, as made and signed by the court, are insufficient to justify the conclusions of law made by the court and insufficient to support the judgment.

We believe that all questions of law that may be reviewed by this court in this case arise out of

Assignment of Error Nos. XIV, XV, and XVI, classified by us as Group III, and Nos. XXX to XXXIV, classified by us as Group V, and for this reason we will hereinafter present our arguments on the questions of law arising out of the Assignments of Error included in Group III and Group V.

GROUP IV.

Into this group fall Assignments of Error Nos. XVII to XXIX, both inclusive, which are to the effect that the trial court erred in making certain findings of fact as therein noted. (Brief of plaintiff in error, pp. 24 to 31) (Rec. pp. 605-612).

We take the firm position that the findings of fact, as made by the trial court, are not open to review in this court. This position is sustained by the decision of the U. S. Supreme Court in the case of

Stanley v. Board of Supervisors, 121 U S. 535, 547, 30 L. Ed. 1000.

and by the decisions of this court in the following cases:

Sayward v. Dexter Horton & Co., 72 Fed. 758,

Empire State Co. v. Bunker Hill Co., 114 Fed. 417, 52 C. C. A. 219.

Los Angeles Gas Co. v. Western Gas Co., 205 Fed. 707.

In the *Stanley* case the Supreme Court said:

"Several of the assignments of error presented for our consideration are to rulings of the court below upon the evidence before it; to its findings of particular facts; and to its refusal to find other facts. Such rulings are not open to review here; they can be considered only by the court below. Where a case is tried by a court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the argument that upon the evidence the findings should have been different. * * * * "

Plaintiff in error, however, contends that, notwithstanding these decisions, this court may review the findings of fact as made by the trial court, pointing out in its Assignments of Error included in Group IV that no evidence was introduced upon the trial to support the findings of fact to which exception is taken, which is but saying, in other words, that the findings of fact, as made by the court, are wholly unsupported by any evidence.

If this be the law, and this court deems itself possessed of jurisdiction to review the findings of fact as made by the trial court, then we desire to set forth in full the findings of fact to which exceptions have been taken by plaintiff in error, and to show, in as brief a review of the evidence as possible under the circumstances, that there is evidence to support and sustain each and every of the findings of

fact so mentioned.

The findings of fact as made by the trial court are as follows:

FINDING I

"That the plaintiff at all times hereinafter mentioned was and still is a corporation organized and existing under the laws of the State of Rhode Island, with its principal place of business in the City of Providence in said State, and is a citizen of said state."

This finding is not objected to by plaintiff in error.

FINDING II

"That the defendant at all times herein mentioned was the United State Director General of Railroads duly appointed and acting under and by virtue of an Act of Congress and at all times herein mentioned was operating as a common carrier of freight and passengers the railroad lines of the Chicago, Milwaukee & St. Paul Railway Company between the Cities of Seattle and Tacoma, Washington, and the City of Chicago, Illinois. That the Chicago, Milwaukee & St. Paul Railway Company at the times herein mentioned was and still is a corporation organized and existing under the laws of the State of Wisconsin, and is a citizen of said state."

This finding is not objected to by plaintiff in error.

FINDING III

"That on June 21st and 24th, 1918, the plain-

tiff caused to be shipped, freight prepaid, from Canton, China, 1000 bales of waste silk, of which 700 bales were consigned to the order of Messrs. Heidelbach, Ickelheimer & Co., of New York, and 300 bales to Goldman, Sachs & Co., New York, all destined to plaintiff, American Silk Spinning Company at Providence, Rhode Island. *That 500 bales were of the quality known as No. 1 Canton Steam Waste Silk" and 500 bales were of the quality known as "No. 2 Canton Steam Waste Silk."*

Plaintiff in error objected to that portion of Finding III in italics (Assigment of Error XVII) for the reason that there is no evidence to support it.

In this connection we direct the attention of the court to page 118 of the printed record, where it is shown that the witness, Frank G. Taylor was questioned and made answers as follows:

Q. "There was 1000 bales in this shipment?"

A. "1000 bales in the entire shipment."

Q. "And do you know whether or not there were two grades of the silk?"

A. "I believe there was No. 1 and No. 2."

Mr. Korte. "I think we can agree on that. That is all agreed to. There is no dispute about that."

Mr. Korte was the attorney of record for the defendant below, the plaintiff in error here, and the record, as above quoted, shows beyond dispute that there was no question as to the number of bales of each grade, it being understood throughout

the trial that 500 bales of the shipment were of the grade known as No. 1 and 500 bales of the No. 2 grade.

Further, however, we call attention to page 120 of the printed record, where the witness, Edgar W. Lownes, was questioned and made answers as follows:

Q. "Out of this shipment of a thousand bales how many bales arrived in a damaged condition?"

A. "867."

Q. "And the balance came forward sound?"

A. "Yes."

And on page 121:

Q. "Out of the 867 bales damaged how many bales were there of the number one Canton Steam Waste?"

A. "500 bales number one."

Q. "How many number two?"

A. "368 number two."

The foregoing testimony is positive and is absolutely uncontradicted and fully supports that portion of Finding of Fact No. III made by the trial court and excepted to by plaintiff in error.

FINDING IV

"That the said 1000 bales of waste silk were delivered at Canton, China, to Osaka Shosen Kaisha,

Ltd., and upon delivery to and receipt of said bales in good order and condition said Osaka Shosen Kaisha, Ltd., on behalf of itself separately and as a duly authorized agent of the defendant operating lines of railroad, as aforesaid, did jointly execute and deliver four certain through Trans-Pacific and Overland Bills of Lading covering the transportation of said 1000 bales of waste silk from Canton, China, to Providence, Rhode Island, and consigned and destined as aforesaid."

This finding is not objected to by plaintiff in error.

FINDING V

"That by the terms of said bills of lading said waste silk was to be carried by said Osaka Shosen Kaisha, Ltd., from Canton, China, to Seattle, or Tacoma, Washington, on its steamship "Canada Maru" and there deliver to the defendant to be carried by the defendant over the lines of the Chicago, Milwaukee & St. Paul Railway Company and other lines of railroad connecting therewith to the destination named in said bills of lading, to-wit, Providence, Rhode Island and there delivered to the order of said consignee."

This finding is not objected to by plaintiff in error.

FINDING VI

"That said goods were purchased by the plaintiff of the manufacturer in China on four months letter of credit from date of shipment, issued by the consignee banks, and on August 7, 1918, and prior to the arrival of the goods at Tacoma, the consignee banks without receiving immediate payment of the

purchase price, endorsed and delivered the bills of lading to the plaintiff and plaintiff subsequently paid the drafts which had been guaranteed by letters of credit issued by the consignee banks, when the same became due."

This finding is not objected to by plaintiff in error.

FINDING VII

"That said bills of lading were numbered, dated and covered the said 1000 bales of waste silk as follows:

B-L No. 8 dated June 21, 1918, 300 bales.
B-L No. 9 dated June 21, 1918, 200 bales.
B-L No. 10 dated June 24, 1918, 200 bales.
B-L No. 11 dated June 24, 1918, 300 bales.

That each of said bills of lading contained stipulations of the following tenor: 'Any carrier or party liable on account of loss of or damages to any part of said property shall have the right of subrogation for the full benefit of any insurance that may have been effected upon or on account of said property.'

'Except in the case of negligence in the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession) the carrier or party in possession shall not be liable for loss, damage or delay occuring while the property described herein is stopped and held in transit upon request of the shipper, owner or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes.' That at the time the bills of lading were issued freight from the through service was prepaid at the tariff rates as to the railroad service prescribed in the Tariff previously filed with

the Interstate Commerce Commissioner and then in effect."

This finding is not objected to by plaintiff in error.

FINDING VIII

"That on July 30, 1918, and during the time said 1000 bales of waste silk were in course of transportation on said S. S. 'Canada Maru' under the said bills of lading, said vessel stranded and large quantities of salt water entered her holds, and as a result 500 bales of said waste silk known as 'Canton Steam Waste Silk No. 1' and 367 bales of said waste silk known as 'Canton Steam Waste Silk No. 2' became wet from the contact with the salt water.

That upon arrivel of said S. S. 'Canada Maru' at Tacoma, Washington, the said 1000 bales of waste silk were discharged from said vessel. Such discharge was begun early in the morning of August 12, 1918."

Plaintiff in error objects to that portion of Finding VIII in italics (Assignment of Error XVIII) for the reason that there was no evidence introduced upon the trial indicating the number of bales of qualities No. 1 and No. 2 silk waste.

In the portion of the testimony of the witness, Edgar W. Lownes, heretofore quoted in support of Finding of Fact III, is found positive evidence that out of the 1000 bales in the shipment 867 bales arrived at destination in a damaged condition, and the balance (133) arrived at destination in a sound

condition, and that out of said 867 damaged bales, there were 500 bales of No. 1 and the remainder were of No. 2.

In the testimony of Frank G. Taylor on page 95 of the printed record we find the following question and answer:

Q. "There was 133 went forward untouched?"
A. "Yes."

FINDING IX

That the 133 bales of waste silk which had not been wet with salt water were in due course transported by defendant to destination. That the remaining 867 bales which had been wet with salt water were discharged on the dock, which dock belonged to the Chicago, Milwaukee & St. Paul Railway Company, and was then being maintained and operated by defendant as a part of said railway system.

That after the vessel had commenced discharging the wet silk, Mr. Taylor, the representative of the underwriters and owners thereof, called on Mr. Cheeney, the chief clerk of the freight agent at Tacoma, and who was in charge of the dock and the movement of freight therefrom, and told Mr. Cheeney that he was very anxious to have quick dispatch of the wet silk, and that it was important that it should go forward in its wet condition. Cheeney and Taylor looked at the silk as it was being discharged from the vessel and placed on the dock, and Taylor requested that it be forwarded

by silk train service in refrigerator-cars, and Cheeney agreed to so forward it, stating that the cost of such service would be $7.50 per hundred pounds as against the bill of lading freight of $1.75 per hundred, and that there would be an additional charge for refrigeration of aproximately $21.00 per car to pay, all of which Taylor agreed to. On August 14th, Taylor again called on Cheeney to see how the matter was progressing, and he and Cheeney again examined the silk, and Taylor was told by Cheeney that the cars had been ordered and would be brought in shortly, and thereafter the cars were brought in, and approximately one-half of the wet silk bales were loaded on two or more refrigerator-cars for shipment."

Plaintiff in error objects to that portinn of Finding IX in italics for the reason that no evidence was introduced upon the trial in support of same.

It should be noted that in the first portion of Finding IX the court finds that 133 of the bales which had not been damaged by salt water were in due course transported to destination, to which finding no exception is taken; and the court further finds that the remaining 867 bales, which had been wet with salt water were discharged on the dock, which dock belonged to the Chicago, Milwaukee & St. Paul Railway Company, and was then being maintained and operated by defendant as a part of said railway system. No exception is taken to this finding.

The evidence in support of that portion of Finding IX to which exception is taken is so full and complete and uncontradicted that it is very hard for us to understand how plaintiff in error can assert there is no evidence to support the same.

In a printed record the testimony of the witness Frank G. Taylor begins at page 78 and at the bottom of page 79 Taylor says:

"I went over to Tacoma on the 12th of August, on Monday. The ship, as I recollect, had begun to discharge that morning at eight o'clock, August 12th. I went in to see Mr. Cheeney of the Milwaukee Road. I told him that we were very anxious indeed to have a quick dispatch of this silk and that it was very important that it reach destination as quickly as possible."

On page 80, Taylor further says:

"I told him that it was most important that the silk arrive at destination wet. I asked Mr. Cheeney if it would be possible to forward the silk by silk train service, and he said that it would. I asked him if it could go in refrigerator-cars and he said that it could. We looked over the silk and looked over some of the other cargo that was coming out and then walked back to the office—to his office. When we got back to his office I asked Mr. Cheeney what it would cost to send that by silk train service, and he told me that it would be $7.50 per hundred, as against $1.75 for the bill of lading rate. "

(And on page 81):

"$1.75, as I understand it, had been prepaid; and I inquired regarding the cost of refrigeration,

and he told me that it would cost approximately $21.00 a car. * * * I went over to Tacoma on the 14th. I went over there that day to see just how things were getting along, and everything was all right, progressing. (Page 82). Mr. Cheeney told me that the cars had been ordered to be brought in shortly. I went down and I looked at the silk with Mr. Cheeney. * * * * * I went over on the 16th, figuring that I would find the cars loaded and ready to go out. Captain Wheeldon, from New York, was with me that day. (Page 83). I looked at the silk on that day. The condition was—the silk that was on the wharf was practically cool—some bales that showed evidences of heating, but nothing disturbing. The cars—as I remember there was three cars loaded. Three refrigerator-cars on the siding loaded that had just been wetted down. I went over and felt of the bales in the car and they were cool."

Q. "What, or approximately what proportion of the cargo of wet silk had been loaded into the refrigerator-cars?"

On cross examination Mr. Taylor further confirmed the loading of the bales in the refrigerator-cars as follows:

Q. "Did you see two or three cars loaded?"

A. "Well, they were being loaded."

Q. "After they were loaded?"

A. "I did. It was the 16th I was over there."

Q. "And when you were over there, were there two or three refrigerator-cars loaded or unloaded?"

A. "They were loaded." (Page 99).

After the cars had been loaded some question

arose over forwarding the silk and Mr. Taylor, who represented the owners and underwriters of the shipment, was referred to Mr. H. B. Earling, the Vice-President of the Railway in Seattle. Mr. Earling was out of town and Mr. Taylor was referred to Mr. Barkley, his assistant. (Page 83). Mr. Barkley said he woud take the matter up with Mr. Earling and advise Mr. Taylor. Continuing, Mr. Taylor says (page 84):

"That was on the 17th. On the 19th I called on Mr. Barkley again. He had heard nothing from Mr. Earling. On the 20th I called on Mr. Barkley—he had heard nothing then. On the 21st I called on Mr. Barkley, and he told me that the road had decided to forward this freight—to forward the waste; and on the 22nd, the day following I went over to Tacoma again and saw Mr. Cheeney and arranged for the forwarding of the silk in the manner that we had previously arranged."

Mr. Taylor testified (page 79) that in all these matters he was representing the Underwriters and the owners of the silk stating:

"I was requested by the Atlantic Mutual insurance Company, who are members of the Board of Underwriters of New York, to represent the underwriters and owners in that business."

On cross examination, Mr. Taylor further testified (page 91):

Q. "Mr. Cheney was at the docks, that was his office was it not?" A. "Yes." Q. "Now Mr. Che-

ney you found at one of the docks?" A. "At the Milwaukee No. 1 in the office." Q. "That is the dock on the waterfront?" A. "That is right." Q. "You first talked with Cheney?" A. "Yes." Q. "You told him you wanted to see the cargo as it came out of the ship?" A. "I did." Q. "It had not all come out at the time you were there on the 12th?" A. "No sir." Q. "A very small portion of it had come out?" A. "I would say that possibly 200 bales. I went to Mr. Cheney first and Mr. Cheney and I walked down and saw the cargo together." Q. "And you looked at what came out at that time, the two of you?" A. "We naturally looked at what came out of the boat." (Page 92). Q. "And then Mr. Cheney went back to his office, and where did you go?" A. "I went back with him." Q. "And then you talked about sending it forward?" A. "Yes." (Page 93).

In the printed record (page 335) is the testimoney of Fred J. Alleman, a witness for the defendant below, who testified that at the time in question he was the head of the freight department of the Milwaukee Railroad in Tacoma; that he maintained an uptown office at 25th and D Streets about three miles from the docks, and that his office proper was known as the uptown office. (Page 336). That included the freight sheds there where the trains brought in freight and took out freight, and that he had there an operating force of an Assistant Agent and a clerical force sufficient to carry on the work. He further testified (page 336):

Q. "Then you have charge of the docks?" A.

"Yes." Q. "How many docks, if there are more than one, and where are they located?" A. "There were three docks at that time that were in service, No. 1, No. 2, No. 3, and they were located on what is known as the Milwaukee Channel." Q. "That is on Commencement Bay?" A. "Yes." Q. "And those are the docks against which the ships from sea come and unload freight?" A. "Yes." Q. "And what force have you or did you have at that time operating those docks?" A. "I had a Chief Clerk at each dock in charge of the office work; sufficient clerical help to carry on that work, and also a general foreman and assistant general foreman and the necessary labor to carry on that work." Q. "You had a man there by the name of Cheney?" A. "Yes." Q. "What was his full name?" A. "Calvin R. Cheney." Q. "And what position did he hold at the docks?" A. "He held a position as Chief Clerk. (Page 337). Mr. Cheney's work consisted—he was in charge of the office and clerical end with clerks under him and had general supervision of the office." Q. "Now beyoond him, you had then what you call a dock foreman?" A. "Yes." Q. "And what were his duties?" A. "The duties of the dock foreman were to have charge of the discharging of steamers, the loading of steamers, the unloading of cars to and from the warehouse." Q. "Where is Mr. Cheney's office, and where did Mr. Cheney work on the dock with reference to where the ship involved in this lawsuit loaded?" A. "At the extreme north end to what is known as Dock No. 1."

From the forgoing positive and undisputed testimony, it must be very clear to this court that there was ample and complete evidence to sustain and support every part of finding of fact IX as made by the court, and that the objection of plain-

tiff in error to said finding for the reason that no evidence was introduced upon the trial to support the same is wholly without merit. The fact of the matter is that the finding in question is not in the form requested by either party to this action. The trial court having carefully examined the evidence, prepared this finding and expressed it in his own language. A careful comparison of the words of the finding with the testimony of the several witnesses in support of it will show that the finding is practically a reiteration of the exact words of the witnesses whose evidence support it. Furthermore, this testimony is uncontradicted.

FINDING X.

"That after thus contracting for and accepting all of said 867 bales of wet waste silk for transportation as aforesaid and after loading approximately one-half of said bales in refrigerator cars as aforesaid, the defendant without the consent of plaintiff and in disregard of plaintiff's protest, failed and refused to transport said bales of wet waste silk, or any part thereof to destination, and thereafter defendant caused the bales loaded in said refrigerator cars to be unloaded on said dock, all contrary to the terms and requirements of the aforesaid contract of carriage."

The plaintiff in error objects to all of this finding, stating that there is no evidence to support it. (Assignment of Error No. XX).

We have clearly pointed out to this court the

evidence supporting Finding IX relating to the agreement of the defendant, in consideration of the prepaid freight, and of further freight and charges to be paid by plaintiff, to transport the wet silk to destination by silk or passenger train service in refrigerator cars. There can be no doubt but that the defendant, in pursuance of the terms of said agreement, and in part performance thereof, actually ordered the refrigerator cars switched onto the dock and actually loaded over one-half of the bales into the refrigerator cars. That the silk was so loaded, is undisputed. Mr. Taylor (p. 83) testified that three refrigerator cars were loaded and contained, to the best of his recollection, something over one-half of the shipment. Mr. Alleman testified (P. 345) that he saw two cars loaded with the silk waste. Capt. Wheeldon (p. 189) testified that to the best of his recollection, there were two cars and a part of a third car loaded and that he and Mr. Taylor examined the loaded cars. Mr. Corey (p. 241) testified that he saw the silk loaded in the refrigerator cars.

There can be no doubt that after so loading the silk into the refrigerator cars, the defendant refused to transport it in accordance with the agreement. Such is the testimony of Mr. Taylor (p. 86). He says:

"On the 23rd, the following day, Mr. Barkley telephoned my office that the road had definitely decided not to forward."

And on page 87 he says he discussed with Mr. Barkley whether or not the railroad would forward the shipment in its then condition, and that Mr. Barkley told him distinctly they would not forward it, "that they refused to forward it." Mr. Taylor protested, as his evidence shows. Q. "Did you say anything to him with reference to the responsibility of the road for their refusal?" A. "I did." Q. "What did you say?" A. "I told him that, undoubtedly, this would result in a claim for damages against the road."

Again on Page 101 is found the evidence of Taylor to the effect that on the 16th Cheeney told Taylor that the railroad refused to allow the silk to go forward, notwithstanding over one-half of it had previously been loaded in the refrigerator cars.

There can be no doubt that the Railroad Company, after loading several cars of the silk for shipment, according to the agreement, and then refusing to transport the same, according to agreement, proceeded to unload the silk from the refrigerator cars.

Taylor testifies (p. 85) that on the 22nd he saw the silk and at that time the silk "had been

discharged from the refrigerator cars and was lying on the platforms between the two warehouses." And Mr. Alleman (p. 351) testified that the Railroad Company unloaded the cars on the 16th and piled the bales three high on the open platform.

It seems almost useless to take the time of this court to argue over the evidence in support of this finding, for it must be manifest that if the Railroad Company had forwarded the silk, according to agreement, the parties would not now be in litigation about it.

FINDING XI.

"That at the time said 867 wet bales were accepted for shipment as aforesaid and at all times thereafter, the same were properly packed and in condition for safe transportation by defendant from Tacoma to destination by silk or passenger train service in refrigerator cars, and such transportation was not prohibited by any regulation of the Interstate Commerce Commission."

Plaintiff in error objects to all of this finding for the reason there is no evidence to support it (Assignment of Error XXI).

Most of the evidence in the case relates to the condition of the 867 wet bales from the time the same were discharged from the steamer until the same were at a later period dried and eventually

forwarded to destination. Much of this evidence relates to the possibility of spontaneous combustion taking place in the silk in the event the same was loaded into cars at the time and promptly forwarded to destination. It is practically impossible to briefly review all this evidence. When the bales in question were discharged from the steamer they were saturated with salt water. When the bales were piled on the dock fermentation set in and the bales became warm and gave forth an unpleasant odor.

There is ample evidence to sustain the finding of the court that the bales were in condition for safe transportation from Tacoma to destination by silk or passenger train service in refrigerator cars.

Mr. Taylor testified (p. 81) that "it was warm, but there was nothing to worry about, and I never thought anything about it, and I never mentioned the question of it being warm." He and Mr. Cheeney examined the bales and he said, "Neither of us mentioned it. I suppose we had both seen a great deal of that kind of cargo and thought nothing of it."

And on page 82, Taylor further says that on August 14th "I went down and looked at the silk

with Mr. Cheeney and some of the bales, the heat had gone out of the bales entirely, others were still warm."

He further states (p. 83) that on the 16th "I looked at the silk on that day. The condition was —the silk that was on the wharf was practically cool—some bales showed evidences of heating, but nothing disturbing. The cars—as I remember there was three cars loaded—three refrigerator cars on the siding loaded that had just been wetted down. I went over and felt of the bales in the car and they were cool."

And he further testified (p. 85): "I saw the silk, yes, on the 22nd I saw the silk. The silk to the best of my recollection at that time had been discharged from the refrigerator cars and was lying on the platforms between the two warehouses. It was the same as it had always been; some of the bales were warm; others cool; some showed some evidences of heating, but there was nothing disturbing about it."

(P. 86): "I have had considerable experience with rice, with beans, with tea and I must say that I have seen anyone of those commodities much warmer than the silk was."

On cross-examination (p. 116), he says: "The

second day that I was over there, that was on the 14th, the bales were exposed to the sun and they were warm; some were warmer than others, but there was absolutely nothing, in my opinion, to be disturbed about. It never occurred to me that they could catch fire or that there was any danger from them."

On page 115 will be found the testimony of Mr. Taylor respecting his experience over a long period of years in handling cargoes damaged in marine disasters, and no doubt counsel will concede that Taylor has had much experience in this line and that his judgment and advice in matters of this kind is eagerly sought and followed.

The testimony of Edgar W. Lownes, President of the American Silk Spinning Company, is found on pages 118-140. It shows he has been in the business of handling silk for the past 31 years and that his factory uses as a raw commodity principally Canton Steam Waste. (P. 119.) He was asked the question:

Q. "Will you state, Mr. Lownes, from your experience in handling Canton steam waste whether or not in your opinion there is any danger whatsoever from spontaneous combustion when the silk is wet by salt water?" A. "No. There is absolutely no danger." Q. "Have you had any experience with silk waste which had become wet?" A. "Yes, a great deal of experience." (P. 122).

Q. "Have you had consignments of silk waste prior to the waste that is the subject of this suit coming from the Pacific Coast damaged by salt water?" A. "Yes." Q. "Has there been any evidence of combustion?" A. "No." Q. "Have you ever heard of silk waste, Canton steam silk waste, igniting by spontaneous combustion?" A. "Not of itself, no."

(P. 128):

Q. "Now, in order to move this cargo of waste silk, Mr. Lownes, from Tacoma to Providence at the time it was offered to us in the wet condition it would have to be kept wet and not allowed to dry?" A. "Not necessarily." Q. "You would have to keep it wet to the extent of keeping down fermentation, would you not?" A. "No." Q. "You could ship it in that condition, saturated completely and allow it to come along?" A. "If it came on a silk train, yes." Q. "We will say a silk train—that moves in how many days, six or seven days?" A. "Yes." Q. "You don't think it would ferment to any extent?" A. "Not enough to damage it."

(P. 134):

Q. "You spoke of a former experience that you had in the shipments—especially the shipments from the Pacific Coast through—that there was no evidence of combustion. What did you mean by 'combustion'? Did you mean a flame?" A. "No, nothing. No charring." Q. "Did you find any heating at all?" A. "Yes, but not over, I should say, 120 degrees." Q. "What was the extent of damage of that particular shipment?" A. "The damage was very small. We have had shipments come through with very few bales damaged out of a big shipment and practically no loss."

Theodore Bellinger, whose evidence appears on pp. 140-165, states that he is the General Agent

of the Champlain Silk Mills, and is factory manager of the Whitehall plant and attends to the purchase of raw material, and that the Company handles No. 1 and No. 2 Canton silk waste. He was asked (p. 141):

Q. "State whether or not in your opinion and from your experience Number 1 and Number 2 Canton steam silk waste which has been wet with salt water is liable to spontaneous combustion?" A. "I do not." Q. "Have you had shipments of Canton steam waste come to your factory damaged by salt water?" A. "Yes." Q. "Have you observed any tendency to spontaneous combustion?" A. "I did not." Q. "Have you ever heard of Canton steam waste igniting from spontaneous combustion?" A. "I never have."

Fred Pearson, a foreman silk-dresser, employed in that capacity since 1875, both in England and America, testified as follows (p. 170):

Q. "During this time, Mr. Pearson, have you handled silk waste, Canton steam silk waste?" A. "More or less, yes." Q. "Will you state, Mr. Pearson, whether Canton steam waste which has been wet with salt water or fresh water can ignite by spontaneous combustion?" A. "I should say no, it cannot."

Samuel H. Pearson, Superintendent in the factory of the American Silk Spinning Company, and having forty-two years experience in the silk business in England and America, testified (p. 176):

Q. "Have you during that time handled Can-

ton silk waste?" A. "Yes, both before I came here and ever since." Q. "You have handled it all during your experience in the silk business?" A. "Yes, sir." Q. "Have you had any experience with Canton steam waste which has been wet by salt water or fresh water?" A. "Yes."

Q. "Will you state whether or not in your opinion Canton steam waste which has been wet can ignite by spontaneous combustion?"

A. "Not to my knowledge."

Q. "Have you ever heard of it igniting from spontaneous combustion, because it has been wet?"

A. "No."

Arthur B. Little of Cambridge, Mass., a chemist and chemical engineer in general practice in Boston since 1886, and a chemist to very many mills employed in the manufacture of textiles and other fibrous raw materials, was examined as a witness for plaintiff below. His testimony appears in the printed record, pages 194 to 219. He testified as follows (page 195):

Q. "Have you investigated cases of spontaneous combustion and are you familiar with those phenomena?" A. "I have and am." Q. "Are you familiar, Dr. Little, with what is known as Canton steam silk waste, known as No. 1 and No. 2 grades?" A. "I am." Q. "Will you state whether or not in your opinion Canton steam silk waste of either of these grades, when wet with sea water is in any way liable to ignite with spontaneous combustion?" A. "In my opinion, it is not." (Page 196): Q. "Is it possible for sufficient heat to be developed by fermentation to cause any danger of spontaneous

combustion or ignition in the material?" A. "In my opinion it is not."

On page 198 the condition of the cargo in question at the time in question was described to Mr. Little and he was asked (page 199):

Q. "Will you state whether or not, in your opinion, there would have been any danger whatever of excessive heating or spontaneous combustion in that cargo?" A. "In my opinion there would have been neither."

On page 201,

Q. "Does it by any means follow, Dr. Little, that because animal or vegetable matter is heating, there is any danger of spontaneous combustion?" A. "It does not."

Again on page 202 the condition of the cargo at the time and place was described to him and he was asked,

Q. "Will you state whether or not, in your opinion there would be any reasonable grounds for assuming that the cargo was dangerous or in any way liable to spontaneous combustion?"

A. "In my opinion there were no reasonable grounds for such assumption."

On page 210 he says:

"I was, in fact, chemist to the Canadian Pacific Railway and made very extensive trips over its lines, and my estimate of the mental capacity and knowledge of their business possessed by railway freight agents and their familiarity with the gen-

eral characteristics of materials offered for freight would lead me to believe that an agent to whom a valuable shipment of common material were thus presented would be, and should be expected to possess the common knowledge of its relations to spontaneous combustion."

And on page 217 he further states:

"Canton Steam Silk Waste is a commodity of such well known character and frequent shipment and commercial value that those engaged in its transportation, and particularly the freight agents of transcontinental railways by which such material is commonly transported might, it seem to me, in my opinion, be properly assumed to possess the general knowledge of its properties and characteristics as regards any tendency to spontaneous combustion. In other words, they should know that it is commonly recognized that it has no such tendencies."

Edward A. Barrier, of Cambridge, Mass., a chemical engineer, graduated in 1905 from Massachusetts Institute of Technology, and the Assistant Chief Engineer of the Inspection Department, Associated Factory Mutual Fire Insurance Companies, was a witness for plaintiff below. His testimony is found in the printed record, pages 219 to 237, on page 222 it reads:

Q. "Are you familiar with Canton steam silk waste of the grades of No. 1 and No. 2?" A. "In a general way as related to its properties from a fire standpoint." Q. "Have you investigated and considered the properties of that commodity of

those two grades as to whether or not it is liable or possible to ignite spontaneously?" "I have." Q. "Is it possible for Canton steam silk waste of No. 1 and No. 2 grades which has been wet with either fresh or salt water to ignite spontaneously?" A. "In my opinion it is not."

On page 229 the condition of the cargo at the time and place in question was described to him and he was asked whether under such circumstances the cargo was a dangerous commodity to transport and liable to spontaneous combustion. He answered:

"I do not consider that the freight agent would be justified in taking that action. I might say that my reason for that is this; that I believe that a man whose duties it is to pass upon such important questions as that should be familiar at least with the general properties of the material with which he is dealing and the properties of raw silk with relation to spontaneous ignition such as is generally known among those who are qualified to give information on the subject are easily obtained. (Page 230).

Q. "Mr. Barrier, is it a matter of common knowledge among men who handle Canton steam silk waste as distinguished from chemical experts that it is not liable to spontaneous combustion?" A. "I should say it is." Q. "Is the fact that a commodity of animal or vegetable matter heats from fermentation alone reasonable ground for assuming that it is a dangerous commodity to transport or that it is liable to spontaneous combustion?" .A "I should say not. The railroads are regularly transporting material which is subject to heating which does not ignite spontaneously."

Russell Hook, a 1905 graduate of the Chem-

istry and Dyeing Department of the Lowell Textile School and chemist to many of the New England textile plants was a witness for plaintiff below, whose testimony appears in the printed record page 257 to 313. At page 290 it reads:

Q. "From all the tests and experiments that you have conducted, Mr. Hook, and from your general experience with textiles, will you give us your opinion as to the possibility of either No. 1 or No. 2 Canton steam silk waste under any circumstances igniting from spontaneous combustion?" A. "It is my opinion that there is no possible chance of silk waste similar to grades No. 1 and No. 2 that I have experimented with igniting spontaneously." (Page 291). Q. "Assume that the No. 1 and No. 2 Canton steam silk waste, thoroughly wet with sea water, in bales, were loaded in refrigerator cars, whether or not combustion could possibly be supported in the case emanating from the fermented silk." A. "I can not conceive of combustion existing or supported in the presence of the amount of ammonia that would be involved in the amount of fermenting silk."

(Page 292). The condition of the cargo at the time and place in question was then fully described to him and he was asked the question, (page 293):

Q. "Will you state whether or not, in your opinion, there would have been any reasonable ground to suppose that there would have been danger of spontaneous combustion in the silk?" A. "My answer is that there would be no reason to believe, under the conditions you have described, that there would be spontaneous combustion of the silk."

On page 299 the condition of the cargo at the

time and place in question was fully described to Mr. Hook and he was asked the question:

Q. "Would a person occupying the position of a claim agent of the railroad, assumed to have experience in handling cargoes generally, have been reasonably justified in assuming the cargo was dangerous and liable to spontaneous combustion?" A. "My answer would be that they would not be justified in refusing shipment of a cargo under conditions as stated."

Harry Mereness, operating chemist of the National Spun Silk Company of New Bedford, and in control of the raw products of twelve textile mills, was a witness for plaintiff below. His testimony appears in the printed record, page 314 to 333. He was asked the question, (page 313):

Q. "In your capacity as operating chemist of the National Spun Silk Company, have you had experience, and have you handled Canton steam silk waste of the grades of No. 1 and No. 2?" A. (Page 316). "My principal—you might say my principal job is the handling of steam wastes and other varieties of raw wastes in the preliminary processing stages, that is what we call boiling off—and that is my principal job." Q. "Will you state from your experience in those tests and from your experience with wet Canton steam silk waste in the mill, whether or not in your opinion there is any possible danger of spontaneous combustion which has been wet in salt water?" A. "In a general way, I would say I can not conceive in an ordinary condition either letting material dry naturally in ordinary room temperatures or heating at temperatures below 280° Fahrenheit of any chance of spontaneous combustion."

The condition of the cargo at the time and place of question was then fully described to him and he was asked to state whether or not, in his opinion, there would have been any danger of spontaneous combustion in the silk, to which he answered, (page 318):

"Under the conditions stated, I do not believe there would have been any chance for spontaneous combustion to have taken place."

George Corey, a marine surveyor, was a witness for plaintiff below. His testimony is found in the printed record, page 237 to 256, and is in part as follows. (Page 241):

Q. "And did you see the silk in the refrigerator cars?" A. "Yes sir." Q. "What was its condition, did you examine it?" A. "The condition when I saw it was in the same condition as it lay on the dock—warm." Q. "Was it heating to any alarming degree?" A. "No sir." Q. "Was there any danger in your estimation of spontaneous combustion?" A. "No sir, none whatever." (Page 242). Q. "From your experience in handling damaged cargoes, Mr. Corey, will you tell the court whether or not, in your opinion, the damaged silk waste of the American Silk Spinning Company was in any way dangerous to transport across the continent in those cars?" A. "Your Honor, if it had been

my silk I would have sent it forward immediately, as a matter of fact I ordered the stuff in the cars and recommended it to go forward." Q. "Did you hear anything more about the railroad refusing to forward it?" A. "Yes." Q. "Will you state what happened?" A. "I was standing in the vicinity of the silk and this gentleman was standing about the same distance from me that you are standing from me, and he walked up to me and said 'That silk can not go,' and I says 'Why?' 'Well,' he said, 'it might burn up the cars—it might burn up the depot—it might burn up the railroad property' and I says 'Mister,' I said, 'The Germans might come over here and shoot us all up, but they are not going to do it, and neither will that silk burn up the cars, and I am very much surprised to have you hold that silk here.'" (Page 244). Q. "Did it at any time show any signs of undue heating so as to cause alarm from spontaneous combustion?" A. "No sir, not in my mind, none whatever."

Respecting the manner in which the bales were packed, Mr. Bellinger at page 165 of the printed record said:

"There are three distinct parcels which are tied together in what they call the go-downs in Canton, and those three parcels are combined and tied up with a piece of rattan and covered over with straw matting, and those bales are put up

in uniform weight in what we call picol bales of 133 pounds."

The foregoing brief notations from the evidence of the several witnesses named are, we believe, sufficient to convince this court that there was ample, full and complete evidence in the case before the trial court to support finding of fact XI as made by the trial court. The silk waste was packed in bales in the usual and customary manner. The bales had not been broken at the time that same were discharged from the steamer and were not broken thereafter until it became necessary to break them open to dry the silk as a result of the railroad company having refused to transport it according to its agreement.

FINDING XII

"That thereafter defendant demanded that said bales be dried and reconditional before defendant would transport the same to destination, and plaintiff in order to secure transportation of said bales to destination was required to and did cause the same to be dried.

That the reasonable cost and expense of drying said bales was $5000.00, which sum plaintiff paid therefor.

That plaintiff in taking possession of said 867 bales of wet waste silk for the purpose of drying it as

aforesaid did so without relinquishing any of plaintiff's rights in the premises.

That after said 867 bales had been dried as aforesaid, the defendant transported the same without additional freight or charge to destination, to wit: Providence, Rhode Island, and there delivered the same to plaintiff.

Plaintiff in error excepts to that portion of this finding in italics upon the ground that there was no evidence introduced upon the trial to support the same. (Assignments of Error Nos. XXII and XXIII).

It will be noted that plaintiff in error takes no exception to that portion of this finding to the effect that defendant below demanded that the bales be dried and reconditioned before they would transport the same, and that in order to secure transportation of the bales the plaintiff below was required to and did cause the bales to be dried.

In support of that portion of this finding to which exception is taken, we direct the attention of the court to the evidence of the witness Taylor as set forth in the printed record as follows (p. 89) where he was questioned as to what he did after the railroad refused to transport the silk.

A. "Well, there was nothing left for me to do then but to try to dry it, and I made arrangements with the same man; with this Mr. Meyers, to dry the waste."

(Page 90):

Q. "How long did it take to dry the silk?" A. "It took from September 7th until January 30th of the next year." Q. "Under what arrangements with Mr. Meyers was the silk dried?" A. "He agreed to dry it for five thousand dollars." Q. "Did you pay Mr. Meyers that sum for drying it out?" A. "I did."

(Page 107):

Q. "And then you say you contracted with Mr. Meyers to dry this for five thousand dollars?" A. "That is right." Q. "Will you itemize that account—as to why it cost five thousand dollars to dry that stuff?" A. "Well, I do not know why it cost five thousand dollars, but I submitted the offer to dry it for five thousand dollars to my people, and they agreed to it." Q. "Did Mr. Meyers submit to you the things he would have to do in order to dry it?" A. "Yes." Q. "Can you give me some of the items of the cost of the five thousand dollars that he submitted to you?" A. "I imagine the principal item was the labor." Q. "Why would it cost so much?" A. "Because it was a poor time of the year to try to dry anything, and it would take a long time to dry that stuff in the open."

(Page 109):

Q. "Who told you to dry it out—the men from the East?" A. "I got authority to dry it out." Q. "From whom?" A. "From the people I represented." Q. "They thought that was the best thing to do?" A. "That was the only thing we could do at that time, on account of your refusing to carry it forward." Q. "And you were told to dry it by the people in the east?" A. "I was authorized to dry it after it was reported to them that was all I could do."

(Page 110):

Q. "And you cannot give me any of the items that go to make up this five thousand dollars for drying?" A. "Well, there was considerable lumber. There was a setting up of the racks. There was the breaking up of those bales of silk and hanging it on those racks."

On cross examination, Mr. Taylor testified as follows, (p. 105):

Q. "Then when it was finally refused by Tacoma you said the only thing you could do was to take the cargo back?" A. "No, I did not say that." Q. "Well, you took the cargo then from the possession of the railroad?" A. "I never did."

The testimony of Mr. Taylor respecting the manner in which the silk was dried, the necessity for drying it, and time and expense incurred in drying it, and the reasonableness of the cost is fully supported and confirmed by the testimony of Mr. Meyer found in the printed record at pages 426-434.

FINDING XIII

"That the drying of said 867 bales of wet waste silk was done in a reasonable and proper manner.

That the natural and approximate result of the drying of said bales of waste silk was a weakening of the fiber and a discororation of said waste silk. That upon arrival of said 867 bales of waste silk at destination, the reasonable, fair market value thereof was the sum of $14,815.67, and no more."

Plaintiff in error objected to that portion of

this finding in italics upon the ground that there was no evidence introduced upon the trial to support the same. (Assignments of Error Nos. XXIV and XXV).

Respecting the effect of the drying out process upon the silk bales, the court's attention is directed to the testimony of the witness Lownes in the printed record at page 139. He was the president of the plaintiff, American Silk Spinning Company. He states that after the bales had been dried and later arrived at the plant of his company in Providence, Rhode Island, he examined the bales and found that they were unfit for use because of the deterioration in the bales which had resulted from the drying out process.

Q. "Could you give any idea how much the fiber had been weakened?" A. "No, I couldn't give it in terms of figures?" Q. "Well, had it been materially weakened?" A. "Yes. So much so that it wasn't commercially practical to use it—that is, for spun silk. It could be used for something else, for making what is called a noil silk where they break the fiber up and spin it on a wool machine." Q. "Couldn't you work it in with your other silk, Mr. Lownes?" A. "Not without spoiling the other silk." Q. "In what way would it spoil the other silk?" A. "Our silk that we get is a very nice long silk, white and of uniform fibre. The minute you put a short fiber in with a good silk you would cause what we call slugs, or bad places in the yarn and the short fiber would show." Q. "What would it be worth for use in the noil silk?" A. "Worth

very little, perhaps four or five cents a pound. No, it couldn't be used in regular business."

Mr. Bellinger, a witness for the plaintiff below, the factory manager of the Whitehall plant of the Champlain Silk Mills, possessed long experience and much knowledge in matters pertaining to Canton steam silk waste. In his testimony at page 162 of the printed record, he was asked the question:

Q. "You spoke about drying out and remaining in a dried out condition, causing a weakness of fiber; will you explain that?" A. "Yes, we find that waste silk which is wet and allowed to dry in the natural process of drying will be more discolored and much more difficult to process afterwards than a waste which is treated after being wet and not having been allowed to dry out." Q. "As I understood, you testified on cross-examination that you saw samples of this particular cargo of silk waste?" A. "Yes, we had some samples sent to Whitehall, and I saw the waste. Afterwards I was present at the auction you held in New York, and saw the goods in the warehouse." Q. "And you know the condition?" A. "Yes." Q. "Will you describe the condition of the silk waste you saw?" A. "The samples on exhibition there in the basement of the building were still, some of them quite damp. The stock was very dark in color, and in our estimation had been very much weakened."

Respecting the portion of the finding relating to the fair market value of the 867 bales on arrival at destination, it seems to us the evidence in support of this finding is ample, positive and uncontradicted.

When the bales finally arrived at the plant of the American Silk Spinning Company at Providence, Rhode Island, it was found that the drying out process had caused such weakening of the fiber and discoloration of the silk as to make the same practically worthless for manufacturing purposes. After some negotiation, it was determined that it should be sold on the open market for the best price obtainable.

Charles E. Burling, of the firm of Burling & Dole, 599-601 Broadway, New York City, Auctioneers, was a witness for plaintiff below. His testimony is found in the printed record at pp. 165-169. He testified that his firm sold the 867 bales at auction in New York City during the month of March, 1919. It is conceded that the bales so sold were the identical bales of silk waste involved in this suit (p. 166).

His testimony reads:

Q. "Did you advertise the sale of the raw silk?" A. "The auction sale of the raw silk which was to take place on Wednesday, March 19th, 11 o'clock at 599 Broadway was advertised in the following papers: "Journal of Commerce," 17th, 18th and 19th of March; "Daily News Record," the same dates and "New York World," March 19th. We caused to be printed a circular descriptive of the seven carloads which we sent to the trades interested within a radius of 250 miles. 500 of these circulars were sent out. We had numerous prospective buyers call, but not many required the per-

mit to examine the car lots after viewing the one car which had been subdivided into three lots. The sale took place as advertised and the ten lots were purchased by four different buyers. There were possibly 25 to 35 people in attendance when the sale was held. The buyers were silk merchants, either jobbers or manufacturers. The gross proceeds of the sale amounted to $16,628.42, less charges as follows: Commission, $831.42; cataloguing, advertising, circulars, postage and insurance—insurance for what we had in our store—$124.71; labor and weighing—for the lot that was in the store we had a weigher come—$91.55; freight and cartage paid $681.93; port warden's fee, being held for a decision as to the legality of the charge, $83.14—making a total charge of $1812.75—net proceeds of the sale $14,815.67."

FINDING XIV

That had defendant carried out its contract with plaintiff and transported said 867 bales of wet waste silk to destination by silk or passenger train service in refrigerator-cars, the fair market value of 500 bales of No. 1 waste silk upon delivery at destination would have been $95,394.25, less 10%, and the fair market value of the 367 bales of No. 2 waste silk upon delivery at destination would have been $40,342.27, less 10%, and the total net value of said 867 bales upon delivery at destination would have been $122,163.32."

Plaintiff in error excepted to all of this finding for the reason that there was no evidence introduced upon the trial to support the same (Assignment of Error XXVI).

The witness, Lownes, testified as follows (p. 120):

Q. "Out of this shipment of a thousand bales how many bales arrived in a damaged condition?" A. "867." Q. "Out of the 867 bales damaged how many bales were there of the number one Canton steam waste?" A. "500 bales number one." Q. "And how many of number two?" A. "367 number two."

On page 126 he was asked what was the value of No. 1 and No. 2 Canton silk waste in New York in August, 1918, to which he replied:

"The number one was five shillings eight pence per pound, and the other, number two, was three shillings two pence." Q. "Have you that in dollars and cents?" A. "$1.51 for the number one and 87 cents for the number two."

and he further testified that there were 46,613 pounds of No. 2. He was then asked what would have been the market value of the 867 bales of silk in New York in August, 1918, had the same been promptly forwarded from Tacoma to New York in their wet condition, and pursuant to the agreement of the Railroad Company to so forward the same in refrigerator-cars by silk or passenger train service, to which he replied in substance that the value of the silk would have been 10% less than its value in New York at the time in a sound, undamaged condition.

The witness Burling, who later sold the silk in New York at auction, was asked the weight of

the silk, to which he replied (p. 166) 112,000 pounds —to be accurate, 112,101, and Mr. Korte, attorney for the Railroad, conceded that the silk waste which was handled by Mr. Burling was the identical silk waste involved in this suit.

The witness, Bellinger, testified (p. 165) that the weight of the bales was 133 pounds each and that they make an allowance of 5% on the original weight, due to the loss of weight in transit, on account of the moisture drying out in the transportation between Canton and America.

Mr. Lownes endeavored to state in exact dollars and cents the value of the silk in question at New York, but it is very manifest that the total amounts, as given by him are incorrect, and that, through inadvertence, he computed the value of the bales of No. 1 silk at 87 cents per pound, which he testified was the value of the No. 2 silk, and that through like inadvertence, he computed the value of the bales of No. 2 silk at $1.51 per pound, which was the value of No. 1 silk. It is rather unfortunate that this error in computation of values was made, but it is not of any great importance for the reason that knowing the weights of each grade, and the value of each grade per pound, the total value can be computed with little difficulty.

Taking the total weight, 112,101 pounds, as

testified to by witness Burling, and deducting therefrom the weight of the No. 2 grade, 46,613, as testified to by witness Lownes, we have 65,488 pounds as the weight of No. 1 grade. 65,488 pounds No. 1 grade at $1.51 per pound gives $98,886.88 as the value of the No. 1 grade; 46,613 pounds of No. 2 grade at 87 cents per pound gives $40,553.31 as the value of No. 2 grade. The sum of these two items is $139,440.19. Deducting from said sum 10% thereof, gives $125,496.18. It will be noted these figures practically correspond with the values of $95,394.25 for the No. 1 grade, and $40,342.27 for the No. 2 grade, and the total of $122,163.32 for both grades as found by the trial court, and were there no other evidence, the evidence above given is wholly sufficient to support the finding. However, we believe the trial court made its own computations based upon the above evidence as follows:

NO. 1 SILK WASTE

500 Bales of 133 lbs. each	66,500 lbs.
Deduct 5% for normal shrinkage	3,325 lbs.
	63,175 lbs.
value at $1.51 per lb.	$95,394.25

NO. 2 SILK WASTE

367 Bales of 133 lbs. each	48,811 lbs.
Deduct 5% for normal shrinkage	2,449 lbs.
	46,371 lbs.

Value at $.87 per lb.	$40,342.77
TOTAL SOUND VALUE	$135,737.02
Deduct 10% for loss in value had bales been promptly shipped to New York wet	13,573.70
	$122,163.32

The above figures are the exact figures as found by the trial court and the evidence above noted fully supports the same.

FINDING XV

"That in addition to the bill of lading freight the contract between the defendant and plaintiff relating to the transportation of said 867 bales of wet waste silk from Tacoma, Washington, to destination by silk or passenger train service in refrigerator-cars required the plaintiff to pay further freight and charges amounting to $6,724.75."

Plaintiff in error excepts to all of this finding for the reason that no evidence was introduced upon the trial to support the same (Assignment of Error XXVII).

There is, in our opinion, ample evidence to sustain this finding. The witness Taylor on page 81 of the printed record testifies as follows:

"When we got back to his office I asked Mr. Cheeney what it would cost to send that by silk train service, and he told me that it would be $7.50 per hundred, as against $1.75 for the bill of lading rate. $1.75, as I understand it, had been prepaid; and I inquired regarding the cost of refrigeration

and he told me that it would cost, approximately $21.00 a car."

and on page 95 he testified further:

"I think, to the best of my recollection, I think we figured on five cars."

On this basis, the freight, in addition to the prepaid freight of $1.75 per hundred, would be $5.75 per hundred, plus the cost of refrigeration of $21.00 a car. The weight of 867 bales at 133 lbs. per bale was 115,311 lbs, the additional freight on which, at the rate of $5.75 per hundred pounds, would be $6,619.75, to which should be added the cost of refrigeration of $105.00, making a total of $6,724.75 of additional freight and charges.

FINDING XVI

"That as a result of the failure and refusal of the defendant to perform its contract to transport said 867 bales of wet waste silk from Tacoma, Washington, to destination by silk or passenger train service in refrigerator-cars, the plaintiff has been damaged in the sum of $105,622.90."

To this finding plaintiff in error excepted on the ground that there was no evidence introduced upon the trial to prove the same (Assignment of Error XXVIII).

The evidence referred to in support of the 12th, 13th, 14th and 15th Findings fully and completely supports the facts in this finding, and the matter

resolves itself purely into a question of computation.

In Finding XIV the court found that had the wet silk been transported in accordance with the contract, its value upon delivery at destination would have been $122,163.32. From this sum should be deducted the proceeds of the auction sale, $14,815.67, and the additional freight for silk train service and refrigeration charges, $6,724.75, which leaves $100,622.90, to which last named sum should be added the cost of drying the silk at Seattle, $5,000.00, giving the final result of $105,622.90.

It is very easy to see how the trial court arrived at the figures set forth in this finding, and it is clear, beyond dispute, that the evidence supports the figures.

FINDING XVII

"That all of said 1000 bales of waste silk were insured against damage in transit from Hong Kong to Providence, Rhode Island, by an open policy issued by the Atlantic Mutual Insurance Company, and on February 6, March 7, and March 12, 1919, *the plaintiff received from the insurance company $102,052.96 in the aggregate "as a loan pending collection of loss on 867 bales of silk waste ex steamer "Canada Maru" refund of the loan to be made*

to said Atlantic Mutual Insurance Company out of the proceeds of the collection specified."

With respect to shipments such as involved in this action the insurance policy contained a clause as follows: "It is by the assured expressly stipulated in respect to land carriers that no assignment shall be made to such carriers of claim for loss or contribution of any kind under this policy, nor shall the right of subrogation be abrogated or impaired by or through any agreement intended to relieve such carriers from duties or obligations imposed or recognized by the common law or otherwise. (31)."

Plaintiff in error excepts to that portion of this finding in italics upon the ground that there was no evidence introduced upon the trial to support the same (Assignment of Error No. XXX).

In the printed record, page 661 and 662, are found three receipts which were introduced in evidence as defendant's Exhibit No. 29. These receipts are in identical form except as to dates and amounts. The first receipt is as follows:

"$50,000.00 February 6, 1919.

RECEIVED from Atlantic Mutual Insurance Company Fifty Thousand and 00/100 Dollars as a loan pending collection of proceeds of loss on 867 bales silk waste ex. Str. "Canada Maru," refund of the loan to be made to said Atlantic Mutual In-

surance Co. out of the proceeds of the collection specified.

(Signed) American Silk Spinning Co.
Edgar A. Lounge, ,res."

The next receipt is dated March 7, 1919 and covers a similar loan of $25,000.00, and the third receipt is dated March 12, 1919 and covers a similar loan of $27,052.96. The total of the three loans, as set forth in the three receipts, is $102,052.96.

The three loan receipts speak for themselves and amply, fully and conclusively support the portion of the findings of fact as made by the court to which plaintiff in error takes exception. The receipts were introduced in evidence by the plaintiff in error (defendant below). So far as we are advised, there is no other evidence in the record pertaining to these loans.

As heretofore stated, we do not believe the findings of fact as actually made by the trial court are open to review in this court. In any event, this court will go no further than to inquire as to whether there was *any evidence* to support the findings of fact to which exception has been taken, and if this court finds that there was *any evidence* to support the findings, then the findings must stand.

We believe we have clearly pointed out to this court that there is evidence in the record to sustain each and every finding of the court below.

GROUP V

Into this group fall Assignments of Error Nos. XXX to XXXIV, inclusive, which assignments are set forth on pages 31 and 32 of brief of account in error, and are to the effect that the trial court erred in making the conclusions of law which it did make, and in rendering final judgment in favor of the plaintiff against the defendant. The conclusions of law, as made by the trial court, are as follows: (Page 34).

1. That plaintiff is the real party in interest and entitled to maintain this suit.

2. That the contract between Cheeney and Taylor for the movement of the goods from Tacoma by silk train in refrigerator-cars was valid and binding on the defendant and no good and sufficient reason is shown for defendant's refusal to comply therewith.

3. That plaintiff is entitled to have and recover from defendant damages in the sum of $105,622.90 with costs and disbursements properly taxed

in this action, and that a judgment in favor of the plaintiff and against the defendant shall be entered accordingly.

As previously noted in this brief, the above conclusions of law, as made by the trial court, are in effect the direct opposite of the conclusions of law which the plaintiff in error (defendant below) requested the trial court to make, which requests the trial court refused, and to which refusal the plaintiff in error took exception and in this court assigns as error the refusal of the trial court to make said requested instructions (assignments of error XIV, XV, and XVI. Brief of plaintiff in error page 24).

The conclusions which the plaintiff in error (defendant below), as noted above, requested the trial court to make are as follows:

(1) The plaintiff herein is not the real party in interest, nor entitled in law to maintain this action.

(2) The defendant is not by any act or omission guilty of any breach whatever of the contract sued on herein.

(3) The defendant is entitled to have a judgment in its favor that the plaintiff take nothing by its action herein.

The conclusions of law which the trial court did make and the judgment which it entered therein, and the conclusions of law which the plaintiff in error requested the trial court to make, and which request the trial court denied, present, in our opinion, the real questions in this case, which can be reviewd by this court, and we will now proceed to the argument of these questions.

The trial court made three conclusions of law, each one of which presents a legal question, and we will argue the questions in the order of the conclusions.

1. THE PLAINTIFF IS THE REAL PARTY IN INTEREST AND ENTITLED TO MAINTAIN THIS SUIT.

The Code of the State of Washington provides (*R. & B. 1915 Code, Sec. 179*):

"Every action shall be prosecuted in the real name of the party in interest except as is otherwise provided by law."

By Section 180 of the same Code, it is provided:

"* * * * a trustee of an express trust * * * * may sue without joining the person for whose benefit the suit is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another."

By Sec. 189 of the same Code it is provided:

"All persons interested in the cause of action or necessary to the complete determination of the question involved shall, unless otherwise provided in law, be joined as plaintiffs when their interest is common with the party making the complaint, and as defendants when their interest is adverse."

By Sec. 196 of the same Code it is provided:

"The court may determine any controversy between parties before it when it can be done without prejudice to others or by saving their rights; but when a complete determination can not be had without the presence of other parties, the court shall cause them to be brought in."

The trial court found that plaintiff caused the waste silk to be shipped from China, consigned to the order of certain New York bankers, destined to plaintiff at Providence, Rhode Island; that said goods were purchased by the plaintiff of the manufacturer in China on four months' letter of credit from date of shipment issued by the consignee banks, and on August 7, 1918, and prior to the arrival of the goods at Tacoma, the consignee banks, without receiving immediate payment of the purchase price, endorsed and delivered the bills of lading to the plaintiff, and plaintiff subsequently paid the drafts which had been guaranteed by the letters of credit issued by the consignee banks when the same came due. (Finding of Fact VI, printed

record page 38). No exception was taken to this finding of the trial court, hence the same stands as the established facts in the case.

The New York bankers were not engaged in the silk, business, nor were they buying silk on speculation. While the bills of lading named the New York banks as consignees, still, by the bills of lading it was recited that the goods were destined to plaintiff, American Silk Spinning Company, at Providence, R. I. All parties to the transaction knew that the banks would endorse the bills of lading over to plaintiff as soon as the bills of lading arrived in New York. This was necessary in order that plaintiff might get delivery of the goods from the carrier. It is the carrier's duty to deliver the goods only upon the surrender of the bills of lading when the bills of lading are what is known as "order bills." There were no drafts attached to the bills of lading for the reason that acceptance and payment of the drafts had been previously guaranteed by the letters of credit. There was no reason why plaintiff should pay the drafts at the time the bills of lading were endorsed and delivered to plaintiff for the reason that the drafts were not then due. Plaintiff did, however, pay the drafts in full when the same became due. It was not contemplated by any of the

parties that the drafts should be paid before the waste silk was delivered at destination.

It hardly seems necessary to cite cases in support of the well recognized principle of law that an endorsement and delivery of an order bill of lading by the consignee therein, passes the title and right to possession of the goods to the transferee. The matter is discussed in the case of *First National Bank vs. N. P. R. Co.*, 28 Wash. 439, wherein the court states:

"Primarily a bill of lading or receipt is not necessary to constitute the contract. The delivery of commodities to the common carrier, with the designation of the person and place of shipment is all that is requisite. Custom and law fix the responsibility and liability of the carrier. The presumption then is that the consignee is the owner, and without notice to the contrary, the carrier may safely make delivery to him. It seems from an examination of a large number of cases involving the nature of bills of lading made by a common carrier, that the custom very generally exists of shippers selling or assigning such bills of lading and receiving payment therefor, and advances upon the same. This custom enables the shipper to receive immediate payment from his local bank. The usage materially aids and stimulates trade and commercial transactions. It enables the small shipper or producer to realize upon agricultural products, such as wheat, at the most favorable market prices."

The court then quotes at length from the case of *Ratzer vs. Burlington Ry. Co.*, 66 N. W. 988, and cites a large number of other cases holding that an

endorsement and delivery by the consignee therein named, of an order bill of lading, transfers the title and right of possession to the goods to the transferee. In the *Ratzer* case above mentioned the court says:

"A well-established custom has grown up in commercial circles by which such bills of lading are treated as the symbols of title to the property in transit, are taken as security for money advanced, and indorsed and delivered as a transfer of the property. This is well understood by the railroad companies and every one else. To allow the railroad companies to ignore this custom would be to destroy the custom itself. This would cause great hardship, revolutionize business methods, and drive all buyers and shippers of small means out of the business, as they could no longer give ready and available security on commodities in transit and thereby turn their limited capital sufficiently quickly and often to enable them to do much business. This, in turn, would destroy competition, and leave the business in the hands of a few concerns with unlimited capital. Neither have the railroad companies any right to ignore this custom. On the contrary, it must be held that these companies have been doing business with reference to this custom as much as the shippers themselves and the consignees, banks, commission merchants, and others, who are continually advancing money on the faith of the security of these bills of lading."

During the time goods are in transit under a bill of lading, the only evidence of ownership that the owner has is the bill of lading. So-called "order bills" are issued by the carrier for the express pur-

pose of enabling the consignee therein to endorse them to such persons as the consignee may order The order bills of lading are negotiable, and negotiation of them is contemplated by their very nature. We are at a loss to understand how it can be contended that one who is the holder of an order bill of lading duly endorsed to him by the consignee therein named, has not a sufficient interest in the goods covered by the bill of lading to maintain a suit arising out of the transportation of the goods subsequent to the time he became such holder.

In support of the contention that American Silk Spinning Company cannot maintain this suit, the plaintiff in error has in its brief cited the case of

Broderick vs. Puget Sound Light & Power Company, 86 Washington, 399.

In that case plaintiff's automobile had been damaged. The casualty company which had insured it ordered certain repairs made to the car but failed to pay the repair bill. The owner of the car, after receiving the machine fully repaired, brought suit against the third party who caused the damage to the car. The court held that the plaintiff, having been fully compensated by the full repair of the machine, and not being liable for the

bill of such repairs since she had not herself contracted the bill, could not maintain an action in her own right. The court said:

"The question presented is finally reduced to whether a judgment obtained by the appellant in this action would operate as a complete defense to an action prosecuted by another person. The appellant not being the trustee of an express trust, if she should recover a judgment, would hold the amount recovered under a trust arising by implication of law. In such a case, the rule supported by the authorities seems to be that if she should recover a judgment, and fail to account therefor to the person entitled thereto, her judgment would not operate as a bar to the right of any other person who had become subrogated to maintain a subsequent action."

It is clear that this case is not in point, but, assuming for the sake of argument, that the case is in point, we respectfully direct the attention of the court to the case of *Alaska Steamship Company vs. Sperry Flour Company*, 94 Wash. 227, 162 Pac. 26, in which it was held that it is no defense to an action against a wrongdoer that the plaintiff was insured against the loss by an employers' liability policy and had recovered the amount of the loss from the insurance company; hence the plaintiff might maintain the action as the real party in interest within the meaning of Rem. Code, Sec. 179.

From the facts in the case it appears that one

Egan, a longshoreman in the employ of the Steamship Company, was injured while loading one of its steamers at the dock of the Flour Company. Egan brought suit against both the Steamship Company and the Flour Company and judgment of dismissal was entered as to the Flour Company, but judgment was entered against the Steamship Company in favor of Egan for approximately $5,000 damages. Later the Steamship Company began a separate action against the Flour Company to recover the amount of the judgment it had paid in the former case, alleging Egan's injury was due to the sole negligence of the Flour Company. By way of defense the Flour Company alleged that the Steamship Company carried liability insurance and that after the Steamship Company paid the judgment in the *Egan* suit, the Liability Company paid the Steamship Company the full amount thereof, together with costs. The court said:

"The sole question raised by this appeal is whether, under this state of facts, appellant (the Steamship Company) is the real party in interest within the meaning of Rem. Code Sec. 179, and therefore entitled to prosecute this action as plaintiff, it being respondent's contention that, as soon as the judgment entered against appellant was paid by the insurance company, appellant was rendered whole and the insurance company was subrogated to all appellant's rights and became the real party in interest and therefore the only one entitled to prosecute this action. * * * Despite respondent's

contention that this is no longer an open question in this state by reason of the rule announced in *Broderick v. Puget Sound Traction, Light & Power Co.*, 86 Wash. 399, 150 Pac. 616, we approach the investigation thereof for the first time and untrammelled by former decisions. In the *Broderick* case *supra*, the plaintiff was not the insured and there never was any insurance paid by the insurer. It is obvious that there could be no question of whether the insured, upon payment of the loss could be subrogated to the rights of the insured; and while there might be some language in that decision which, if construed alone, might tend to support respondent's assertion, yet, when considered in connection with the facts, which must always be the case, this language does not support respondent's position."

The court then cites the case of *Illinois Cen. R. Co. v. Hicklin*, 115 S. W. 752, 23 L. R. A. (N. S.) 870, as follows:

"The law is well settled that a wrongdoer has no right to the benefits of the insurance, and cannot rely, either in full or *pro tanto* on the defense that the owner of the property has been previously paid by the insurance company. Payment to the owner by an insurance company of the amount of his loss does not bar the right against another originally liable for the loss."

The court also cites the case of *The Propeller Monticello*, 17 How. 152, to the same effect.

The court also quotes at length from the opinion of Judge Cooley in the case of *Perrott v. Shearer*, 17 Mich. 48, which case seems to be a lead-

ing case on this subject. The court in the opinion further states:

"There is a fatal fallacy in the reasoning which concludes that the insured is made whole upon payment of the loss to him by the insurer, in that the premiums are not refunded to the insured so paid by him to the insurer for the policy of insurance. * * * "

It also appears in the decision that the Steamship Company was insured in a Mutual Insurance Company and that the Steamship Company therefore had an actual interest because any recovery made by the Insurance Company would inure in part to the benefit of the policyholders of the Mutual Insurance Company. With respect to this feature of the case, the court said:

"Especially do we think this rule should be applied to the facts in this case because it appears that appellant has an actual interest, by reason of the nature of the insurance; for any recovery herein against respondent will be paid to appellant and other members of the club *pro rata* in the proportion that the tonnage of its boats and the contributions entered by it bear to the whole. The appellant was in a measure the insurer of its own liability."

From the foregoing it clearly appears that if there is any inconsistency between the decisions of our Supreme Court in the *Broderick* case and the *Alaska Pacific Steamship Company* case, then the decision in the former case has been modified

or overruled by the decision in the latter case. If either of these decisions is in point, then the latter case clearly establishes the law to be that a party who has collected his insurance may maintain an action as plaintiff against the party causing the loss and that such plaintiff is "the real party in interest" within the meaning of that expression as used in Sec. 179, Remington's Washington Code.

The case of *Illinois Cent. R. Co. v. Hicklin*, 115 S. W. 752, reviews all of the cases on this subject in states having code provisions which require that actions shall be prosecuted "by the real party in interest" and announces the law to be as follows:

"The sounder view is rather that it is enough to entitle plaintiff to maintain the action, as real party in interest if he has the legal title to the demand and defendants will be protected in a payment to or recovery by him. * * * In the case at bar the defendant did not ask that the insurance company be made a party to the action. It may be that, as between plaintiffs and the insurance company, the latter would be equitably entitled to the damages that plaintiffs recovered. The fact, however, that a third party might be entitled to the damages as between him and plaintiffs is not sufficient to bar the right of action by the plaintiffs. * * * As between the plaintiffs and the defendant the former were the real parties in interest. It is immaterial to the railroad company what may be the equities between the plaintiffs and the insurance company. All that it can demand is that a judgment in favor of the plaintiffs will be a complete defense to any further action for the same cause.

In our opinion the judgment in favor of plaintiffs is conclusive, and no action can now be maintained against the railroad company by the insurance company. Any right of action the insurance company may have is against the plaintiffs."

It thus appears that the plaintiff is "the real party in interest" if a judgment in his favor will be a bar to any action brought by any other party against the same defendant arising out of the same subject matter.

In this case clearly the plaintiff is the real party in interest. From the day the bills of lading were endorsed over and delivered to plaintiff the title to the goods and right to possession thereof were in plaintiff. The legal title to the goods thereupon became vested in plaintiff. Plaintiff subsequently, and prior to the institution of this suit, paid the drafts which had been guaranteed by letters of credit issued by the New York bankers. The bankers, having been paid in full, certainly have no interest in this case and could not maintain a suit against defendant. It is certain that the Insurance Company has never been in a position to institute a suit against defendant because it has never paid the loss. But assume for the sake of argument that defendant is correct in stating that the money advanced to plaintiff by Insurance Company was a payment and not a loan, and that the Insurance Company will receive the benefit of

any judgment plaintiff recovers in this case, still the judgment in this case will be conclusive on both plaintiff and the Insurance Company and will constitute a bar to any other action either of them might institute against defendant.

The Washington Code, Sec. 196, previously quoted, expressly provides that the court may determine any controversy between the parties before it when it can be done without prejudice to the rights of others, or by saving their rights, but if other parties are necessary for a complete determination of the controversy, then the court has jurisdiction to order them to be brought in. If the plaintiff in error (defendant below) deemed that it was essential, necessary or proper that other parties should be brought into the action, then it should have made application to the court to have such other parties brought into the action.

If the American Silk Spinning Company is not the real party in interest, then we do not know who is. Certainly the cargo underwriters have no claim against the railroad company as there never was any contract between them. The cargo underwriters have not taken a subrogation from the Silk Spinning Company for the reason that the cargo underwriters have never paid any loss under the policies of insurance and never were and are not

now entitled to any subrogation. The New York bankers who issued the letters of credit have no interest in this controversy for the reason that the Silk Spinning Company paid them in full long before this suit was ever instituted.

THE QUESTION OF OWNERSHIP.

The plaintiff in error in its brief, pages 60 to 67, presents the question of ownership of the silk at the time the contract of carriage here sued upon was made. They point out that at the time the bills of lading in question were, on August 7, 1918, endorsed by the New York bankers and delivered into the possession of the American Silk Spinning Company, the goods were not paid for and that the spinning company gave the New York bankers trust receipts in exchange for the bills of lading.

At the conclusion of the trial, plaintiff in error requested the trial court to make certain findings to the effect that the bankers took from the spinning company the said trust receipts, which trust receipts provided in effect that the merchandise belonged to the bankers until the purchase price should have been paid, and which purchase price was paid when the drafts came due at some later date. (See

plaintiff's requested fiudings of fact X and XI on pages 49 and 50, printed record). The trial court refused to make such findings, and the refusal of the court to make such findings is not a matter which may be reviewed by this court. This court has so held in the following cases: *Sayward v. Dexter Horton & Co.*, 72 Fed. 758; *Empire State Co. v. Bunker Hill Co.*, 114 Fed.; 417; *Los Angeles Gas Co. v. Western Gas Co.*, 205 Fed. 707; and the United States Supreme Court has so held in the case of *Stanley v. Board of Supervisors*, 121 U. S. 535.

The question of ownership, therefore, is not before this court. The trial court did not make any findings as to where the ownership of the goods in question lay, and the matter is now before this court in all respects as though any evidence relating to the question of ownership were entirely stricken from the record. This court will not make any new findings of fact at the instance or request of either party, and the trial court did not make any finding on the question of ownership. In fact the trial court refused to make any such finding, and, as stated above, its refusal in this respect is not open to review in this court.

This much is certain; as the trial court expressly found on the evidence fully and completely supporting such findings, that the bankers on August 7, 1918 endorsed and delivered to the spinning company the four bills of lading in question and thereupon the spinning company became entitled to the possession of the cargo therein described and in the absence of any finding of fact to the contrary, this court must and will assume that the possession of the bills of lading in the hands of the spinning company carried with it the title to the goods covered thereby. The arrangements made between Taylor, representing the spinning company, and Cheeney, representing the railroad, concerning the transportation of the silk in refrigerator-cars by silk train service was made subsequent to the time the bills of lading were delivered to the spinning company. The bills of lading were muniments of title and it is unquestioned that the spinning company were at all times the real parties in interest. Whether they paid for the goods at the time the bills of lading were delivered to them is immaterial. They agreed to pay for them, were liable for the payment, and, in fact, did make the payment when it fell due. It is a most common thing in business transactions for goods to be sold and delivered on credit and no one would question the

ownership of a purchaser in goods purchased by and delivered to him on credit.

Counsel for plaintiff in error desire this court to pass upon the provisions of a so-called trust receipt which is not in evidence and is not before this court. The law is that this court can not and will not consider or review such a matter.

In Volume 10, Corpus Juris, page 353, is found a discussion of the question of the right of one having a beneficial interest in the performance of a contract for the carriage to maintain an action for the loss or injury of the goods. The law is there stated as follows:

"One who has a special property or interest in the goods shipped, or a beneficial interest in the performance of the contract, is entitled to maintain an action for their loss or injury."

In the case of

Harrington v. King, 121 Mass. 269,

it appears that the goods in question had been delivered by the owner under a conditional sale contract to the plaintiff. The right of the owner to resume possession for a breach of the terms of the sales contract had not been exercised by him at the time of the alleged conversion of the property in question. The possession, therefore, was in the plaintiff. The court held:

"The possession, therefore, was in the plaintiff with the consent of the owner, and was not lost by the plaintiff when he left the goods in the house which he last occupied in the care of his brother. Upon the facts disclosed, the brother must be regarded with reference to these goods, as a servant or keeper whose possession was the possession of the plaintiff. This was enough to support this action even if the plaintiff is only to be regarded as a naked bailee. It is a leading principle that bare possession constitutes sufficient title to enable the party enjoying it to obtain a legal remedy against a wrongdoer, and accordingly it is held that a bailee without interest has a title arising simply from his possession sufficient to maintain trover against one who wrongfully invades that possession."

In the case of

Missouri P. R. Co. vs. Peru Co., 73 Kansas 295, 85 Pacific 408,

it is held that

"Where a consignee of goods is a commission agent or a factor for the consignor for their sale, he has such an interest therein as will entitle him to maintain an action against the carrier for the conversion of the goods or damage thereto by delay in transportation."

In the case of

Kirkpatrick v. Kansas City Railway Co., 86 Mo. 341,

the court said:

"The controlling question in this case is the right of plaintiff to maintain this action. On this point we entertain no doubt. * * * Moreover,

the plaintiffs paid the draft drawn on them and received the bill of lading to which the draft was attached, and subsequently purchased the wheat from the owner, Slaughter, they thus became the real parties in interest under the code. The fact that the screenings were destroyed prior to their absolute sale to the plaintiffs does not affect the proper conclusion to be reached. The property of Slaughter in the screenings still continued and was the subject of transfer to plaintiffs and they could maintain this action on the ground of a transfer, if on no other."

The court says, in the case of

Wolfe v. Missouri P. R. Co., 97 Mo. 473, 11 S. W. 49:

"Plaintiffs' right to maintain this action was made an issue by the answer. It is naturally the first subject of consideration. The goods in question were billed by the iron company to plaintiffs at East St. Louis. They received them there and in their own firm name contracted for their delivery at Pope's switch in St. Louis to themselves. They were acting as factors for the iron company in the transaction, having no pecuniary interest in the goods beyond their lien for commissions. By our Code of Practice it is provided that every civil action must be prosecuted in the name of the real party in interest, with certain exceptions. Among these is a 'trustee of an express trust,' who may sue in his name without joining the person for whose benefit the action is prosecuted. The statute explicity declares that 'a trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name a contract is made for the benefit of another.' Rev. St. 1879, Sec. 3463. Plaintiffs fairly come within this statutory definition. In this regard the Code merely designed to preserve a right of

action which existed by the common law of England on such facts as here appear."

The Code of the State of Washington provides *(R & B 1915 Code Sec. 180)*.

" * * * A Trustee of an express trust * * may sue without joining the person for whose benefit the suit is prosecuted. A trustee of an express trust within the meaning of this section shall be construed to be a person with whom or in whose name a contract is made for the benefit of another."

If for any reason this court should consider the American Silk Spinning Co. is not the real party in interest and entitled as such to maintain this action, then clearly it may maintain the action under the provisions of the Washington Code above quoted on the theory as advanced by plaintiff in error that it is "a trustee of an express trust."

The case of

Williamsport Hardware Co. v. Baltimore and Ohio Railroad Co., 77 S. E. Reporter 333,

was a case brought to recover damages for loss of and injury to parts of a shipment of machinery. The court held:

"No rule of pleading requires an averment of absolute ownership in actions of this character. A consignee or bailee, if not the true owner, has a special property in the goods sufficient to maintain an action; anyone having a beneficial interest may sue and recover, but the legal and reasonable presumption is that the consignee is the owner en-

titled to accept delivery at the terminal point and sue for failure of the carrier to deliver in good condition."

When goods are shipped under bills of lading consigned to a consignee therein named "or order" and the consignee endorses and delivers over the bill of lading, the endorsee immediately becomes vested with all of the rights of the consignee. Such was the situation in this case. When the Silk Spinning Company received from the consignee bankers the bills of lading duly endorsed by the consignee bankers, the Spinning Company by virtue of such endorsement thereupon immediately became possessed of all of the rights of the consignee bankers in and under said bills of lading. The court, of course, will bear in mind that the bills of lading were so endorsed and delivered to the Spinning Company prior to the time the goods in question were discharged from the steamer.

The case of *Atlantic Coast Line Railroad Co. v. Partridge*, 50 Southern 634, was a case brought to recover damages for alleged negligence of the carrier in transporting and delivering a car of pears. The question was raised as to the right of the plaintiff to maintain the suit. The court said:

"Be all these matters as they may, the great weight of authority seems to be to the effect that a bailee has such special property in the goods that

he may maintain an action for damage thereto and that anyone having a special interest in the goods may maintain the action, thus a factor, a broker, a warehouseman, carrier or any person employed to perform a service with respect to the goods of another with which he is intrusted for that purpose may maintain an action for the recovery of them or for any damage done them while he has charge."

The cases supporting the right of any person having a beneficial interest in the property to maintain the suit are so numerous that it seems to us the question is not open to discussion. A collection of authorities may be found in *Carter v. Southern Railway Co.*, 36 S. E. 308, 50 L. R. A. 354. *See also Williston on Contracts*, Sec. 960.

On page 64 of the Brief of plaintiff in error the case of *Northern Pacific Railway Co. v. Murray*, 87 Fed. 648, is cited in support of the contention that plaintiff can not maintain this action for the reason that the New York bankers did not assign to plaintiff their cause of action against the railway company. In that case it was held that a cause of action which had accrued in favor of one party could not be prosecuted by another unless the cause of action had been assigned to such other party. The case is not in point, however, for the reason that the damages which the Spinning Company seeks to recover in this case are based upon trans-

actions which took place after the New York bankers had endorsed and delivered the bills of lading to the Spinning Company. The cause of action herein questioned did not accrue prior to the time the bills of lading were so endorsed and delivered. This is not an action to recover damages resulting from the saturation of the silk by salt water prior to the time the silk was discharged from the steamer. This is an action to recover damages resulting from a contract of carriage consummated between plaintiff and defendant after the silk had been discharged from the steamer and after the bills of lading in question had been assigned to plaintiff.

On page 65 of the brief of plaintiff in error is cited the case of *Eastern Oregon Land Co. v. DeChutes*, 213 Fed. 897, in support of the contention that plaintiff can not maintain this suit because it is not the assignee of a cause of action which arose in favor of the New York bankers. The case is not in point. The plaintiff is not attempting to maintain this suit as an assignee of any cause of action which arose in faver of the New York bankers. The cause of action here sued upon arose subsequent to the time the bills of lading in question had been endorsed by the bankers and delivered to plaintiff. It is suing to recover damages resulting from the defendant's breach of a contract of carriage con-

summated between plaintiff and defendant after plaintiff became the endorsee of the bills of lading.

FEDERAL STATUTES

In all of the bills of lading in question the goods are consigned to the order of the New York bankers, and all of said bills of lading were endorsed by said bankers to the plaintiff by written endorsement on the bills as follows: "Please deliver to American Silk Spinning Company or order" and signed by the bankers.

Order bills of lading are defined by the Federal Statutes as follows:

"A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order bill" (*U. S. Compiled Stats.* 1916, Sec. 8604-b).

By the Federal Statutes (*U. S. Compiled Stats.* 1916 Sec. 8604-nn) it is provided

"An order bill may be negotiated by the endorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such endorsement may be in blank or to a specified person."

The Federal Statutes further provide (*U. S. Compiled Stats.* 1916 Sec. 8604-p).

"A person to whom an order bill has been duly negotiated acquires thereby (a) such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith

for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value, and (b) the direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him."

By the Carmack Amendment (*U. S. Compiled Stats* 1916, Ser. 8604-a) a railroad receiving property for transportation from a point in one state to a point in another state and issuing a receipt or bill of lading therefor

"Shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it * * * *".

These statutes all apply to the shipment here in question, which was moving in interstate commerce, and clearly define the nature and character of the bills of lading in question, the manner in which order bills of lading shall be endorsed, the effect of such endorsement, the title acquired by the endorsee, and the liability of the carrier to the endorsee.

BENEFIT OF INSURANCE

A considerable portion of the brief of plaintiff in error is devoted to an argument in support of its contention that the American Silk Spinning Company is not the real party in interest and cannot prosecute this action by reason of a certain clause

in the bills of lading relating to insurance.

The trial court found (Finding of Fact VII) that each of the bills of lading contained stipulations of the following tenor: "Any carrier or party liable on account of loss of or damage to any part of said property shall have the right of subrogation for the full benefit of any insurance that may have been effected upon or on account of said property."

The trial court also found as a fact (Finding of Fact XVII) that the policies of insurance issued by the Atlantic Mutual Company on the cargo in question contained a clause as follows: "It is by the assured expressly stipulated in respect to land carriers that no assignment shall be made to such carriers of claim for loss or contribution of any kind under this policy, nor shall the right of subrogation be abrogated or impaired by or through any agreement intended to relieve such carriers from duties or obligations imposed or recognized by the common law or otherwise."

The policy of insurance in question was introduced in evidence and is found in the printed record at p. 654 as defendants Exhibit No. 28. The policy contains the clause last above quoted.

The trial court found as a fact (Finding of

Fact XVII) that the American Silk Spinning Company, on February 6th, March 7th, and March 12th, 1919, received from the Insurance Company $102,052.96 in the aggregate "as a loan pending collection of loss on 868 bales of silk waste ex steamer "Canada Maru" refund of the loan to be made to said Atlantic Mutual Insurance Company out of the proceeds of the collection specified. The receipts which evidence such loans are found in the printed record at p. 661, the same being defendant's Exhibit No. 29.

Plaintiff in error asserts that these moneys so loaned the American Silk Spinning Company by the underwriters were not in fact loans, but were outright and final payments made by the underwriters to the Spinning Company, in final satisfaction of and in recognition of the underwriters' liability under the insurance policy in question. The Spinning Company positively denies that such is the fact. Such was the issue as framed by the pleadings in the case. It, therefore, becomes necessary to review the transaction and the law applicable to it.

The insurance policy in question was an open policy in favor of the American Silk Spinning Company, Providence, R. I. With respect to shipments such as the one involved in this case, the policy con-

tained the clause above quoted. As heretofore stated, the bills of lading contain the clause above quoted. We, therefore, have a situation where the assured in the policy of insurance has stipulated that it will make no assignment to the carrier of the assured's claim for loss or contribution of any kind under the policy, and has further stipulated that the underwriters' right of subrogation shall not be abrogated or impaired by any agreement on the part of the assured intended to relieve the carrier from its duties or obligations. Notwithstanding such stipulations, however, the American Silk Spinning Company has accepted from the carrier a bill of lading which provides that the carrier, if liable on account of loss or damage to the property insured, shall, by right of subrogation have the full benefit of any insurance the Spinning Company may have effected on the goods described in the bill of lading.

It is interesting to note how this situation has developed. It is clearly the law that an underwriter who pays an assured the amount of his loss for goods damaged or destroyed through the fault of another, is, by virtue of such payment, subrogated to the rights of the assured to proceed against the party through whose fault the loss occurred. It therefore follows that upon receiving payment from

the underwriter, and by virtue of such subrogation, the assured cannot thereafter proceed against the party through whose fault the loss occurred. This for the simple reason that his rights to so proceed have passed by subrogation to his underwriter. The underwriter being so subrogated may proceed against the party through whose fault the loss occurred and so it happens that many carriers through whose negligence goods were damaged or lost, found themselves being sued for the amount of such damage or loss, by the underwriters, who had insured the goods, paid the owner the amount of such loss or damage, and taken a subrogation from the owner.

The carriers, seeking a means to avoid such suits, then began to insert in their bills of lading, clauses similar to the provisions in the bill of lading above quoted, to the effect that the carrier should have the full benefit of any insurance the owner might have placed on the merchandise lost or damaged. The courts were soon called upon to construe the legal effect of such provision, and the Supreme Courts of many of the states, and the United States Supreme Court held such provision valid.

It therefore became necessary for the underwriters to offset the effect of such bill of lading provision, and this they did by inserting in their policies provisions to the effect that the insured

would not make any agreement with the carrier whereby the carrier might have the benefit of any insurance the assured might place on the goods in transit. We have such a provision in the policy of insurance involved in this case, and the provision is quoted above. Courts have frequently passed upon the legal effect of these provisions in policies of insurance, and have sustained them as being legal. The substance of these decisions is briefly this:

That such a provision in a policy of insurance is a warranty and if, in the face of such a provision, the insured makes any agreement with the carrier, that the carrier shall have the benefit of such insurance, then the policy is voided and there is no insurance.

In the case of *Carstairs vs. Mechanics' & Traders' Ins. Co.* 18 Fed. 473, this identical question was passed upon in a suit brought by the owner of the goods against the insurance company upon an open policy of insurance on goods while in transit. The policy stipulated that the insurance company should, in case of loss, be subrogated to all claims against the carrier. Certain goods covered by the policy were destroyed in a railroad collision, having been shipped under a bill of lading which provided that in case of loss, by which the railroad company incurred any liability, the railroad company should

have the benefit of any insurance which might have been effected on the goods. The court held that the insured could not recover because the insured had, by the bill of lading, defeated the right of the insurance company to subrogate against the carrier, to which right the insurance company, under its policy, was entitled. The substance of the decision is contained in the last paragraph in words as follows:

"The insurance company, being practically in the position of a surety, (*Hall v. Railroad Cos.* 13 Wall. 367), and having a right to the subrogation, and the plaintiffs having, by the terms of the bill of lading under which they claim the goods, defeated that right, they cannot be allowed to recover in this action."

In the case of *Inman vs. S. C. Ry. Co.*, 129 U. S. 128 (32 L. Ed. 612), this situation is quite fully discussed. The plaintiff brought suit against the railway company for damages to cotton which, through fault of the carrier, was destroyed during transit. Defence set up the clause in the bills of lading, providing:

"The company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton," and alleged that the plaintiff had fully insured the cotton against the risk, but that defendants had not received the benefit of such insurance, nor had plaintiff given or offered to give it such benefit. The court, in passing on the matter, said:

"If this bill of lading had contained a provision that the railroad company would not be liable unless the owners should insure for its benefit, such provision could not be sustained, for that would be to allow the carrier to decline the discharge of its duties and obligations as such, unless furnished with idemnity against the consequences of failure in such discharge. Refusal by the owners to enter into a contract so worded would furnish no defence to an action to compel the company to carry, and submission to such a requisition would be presumed to be the result of duress of circumstances, and not binding. * * * * By its terms the plaintiffs were not compelled to insure for the benefit of the railroad company, but if they had insurance at the time of the loss, which they could make available to the carrier, or which, before bringing suit against the company, they had collected, without condition, then, if they had wrongfully refused to allow the carrier the benefit of the insurance, such a counterclaim might be sustained, but otherwise not. The policies here were all taken out some weeks before the shipments were made, although, of course, they did not attach until then, and recovery upon neither of them could have been had, except upon condition of resort over against the carrier, any act of the owners to defeat which operated to cancel the liability of the insurance. They could not, therefore, be made available for the benefit of the carrier. Nor have the insurance companies paid the owners."

In the case of *Pennsylvania R. R. Co. vs. Burr*, 130 Fed. 847, this question was before the Circuit Court of Appeals, Second Circuit. The bill of lading provided that the carrier should have the benefit of an insurance effected by the shipper. The shipper insured the goods, under a policy which

contained a provision that in case of any agreement between the assured and the carrier, whereby, in case of loss for which the carrier would be liable, the carrier should have the benefit of the insurance, there should be no liability on the policy beyond the amount which was not recoverable from the carrier. The goods were damaged in shipment, and the insurer advanced a sum to the owner, taking a receipt by which the owner agreed to prosecute his claim against the carrier, and to refund to insurer the amount collected. The court held that such advance was strictly within the terms of the policy, and did not constitute a payment of the loss whereby the carrier could claim the benefit under the bill of lading as a setoff in an action by the owner against the carrier to recover the damages.

In the case of *Bradley vs. Lehigh Valley R. Co.*, 153 Fed. 350, this question was again before the Circuit Court of Appeals of the Second Circuit. The bill of lading provided that in case of loss or damage to the goods the carrier should have the benefit of any insurance for or on account of the owner, and should be subrogated to its rights before any demand on account of such loss or damage should be made by the owner against the carrier. The shippers obtained a policy of insurance on the goods, conditioned that it should not inure directly

or indirectly to the benefit of any carrier by stipulation in bill of lading or otherwise. The goods having been lost by the carrier, the insurer advanced to the shippers an amount equal to the insurance, taking a receipt reciting that it was received

"as a loan without interest, and payable only to the extent of any net recovery we may make from the carriers responsible for the loss."

The court held that the provision of the bill of lading did not obligate the shippers to insure for the benefit of the carrier, nor, if they did insure, to effect such insurance as would protect the carrier; that the shippers were free to procure such insurance as they wished; that the advance made by the insurance company was not a waiver of the conditions of its policy, and did not extinguish the liability of the carrier, nor constitute a defense to an action against it to recover for the loss.

The regular provisions in the bill of lading and the insurance policy are quoted in the decision, and the court, in reply to the contention that the advances made by the insurance company to the shipper constituted a payment, said:

"The appellant insists that this transaction should be regarded as a payment of the loss, and operated to extinguish any right of Nourse & Co. to recover therefor. Treating the transaction as

a payment of the loss, it did not discharge the liability of the railroad company upon the theory of extinguishment. Payment of an obligation of another by a third party does not discharge it as between the original parties, unless the payment is made and received with the intention that it shall do so. * * * The real question is whether the transaction defeated the right of subrogation of the railroad company secured by the stipulation in the bill of lading. When the transaction took place, the insurance policy had become void at the election of the insurance company, because of the breach of the warranty. Although the insurance company was entitled to insist upon its right to treat its contract as nugatory, it could, if it chose, waive that right and treat the policy as a valid and existing one. By making an unconditional payment of the loss, it would have waived the breach, in the absence of some agreement or understanding to the contrary between the parties to the transaction. But the parties were at liberty to agree that the payment should not be unconditional, or that it should not operate as a waiver, or that it should be regarded as a loan or as a gratuity. The receipt indicates plainly that they did not intend the transaction to be an unconditional payment, or regarded as a payment of the loss in any sense. Its form was carefully devised for that purpose. It is industriously framed to show that the money advanced was not advanced in payment of the loss; and apparently to deprive the railroad company from obtaining any benefit from the insurance, and enable Nourse & Co., or some assignee or appointee of theirs, to recover the loss from the railroad company for the benefit of the insurance company. * * * That the insurance company did not intend to waive its right to treat the insurance as nugatory can hardly be questioned. The struggle between carriers and insurers to escape ultimate loss when insured cargo has been damaged or destroyed while in the custody of the carrier has resulted in

efforts by each to cast the burden upon the other by the insertion of astute provisions in their respective contracts with the shippers or owners of cargoes, and by availing themselves of every technical advantage to secure the benefit of their own provisions. To infer that an insurance company has intentionally foregone such an advantage would be to indulge in a violent and preposterous presumption. * * * The same reasons which forbid the enforcement of a stipulation requiring the shipper to insure for the benefit of the carrier would forbid the enforcement of one requiring him when he does effect insurance to procure such as will protect the carrier. The shipper cannot be circumscribed in his liberty to make such a contract with the insurer as he chooses. If he sees fit to make one which may be worthless to the carrier, it is his right to do so. * * *"

The latest case on this subject is *Luckenbach vs. McCahan Sugar Refining Co.*, 248 U. S. 139. In that case the provisions in the bill of lading and in the insurance policies there involved are quoted. The form of receipt, signed by the shipper, for moneys received as a loan advanced from the insurance company, is also set forth. After setting forth the form of said receipt, the court said:

"Upon delivery of this and similar agreements, the shipper received from the insurance companies, promptly after the adjustment of the loss, amounts aggregating the loss; and this libel was filed in the name of the shipper, but for the sole benefit of the insurers, through their proctors and counsel, and wholly at their expense. If, and to the extent that recovery is had, the insurers will receive payment or be reimbursed for their so-called loans to

the shipper. If nothing is recovered from the carrier, the shipper will retain the money received by it without being under obligation to make any repayment of the amounts advanced. In other words, if there is no recovery here, the amounts advanced will operate as absolute payment under the policies. * * * It is clear that if valid and enforced according to their terms, they accomplish the desired purpose. They supply the shipper promptly with money to the full extent of the indemnity or compensation to which he is entitled on account of the loss; and they preserve to the insurers the claim against the carrier to which by the general law of insurance, independently of special agreement, they would become subrogated upon payment by them of the loss. The carrier insists that the transaction, while in terms a loan, is in substance a payment of insurance; that to treat it is if it were a loan, is to follow the letter of the agreement and disregard the actual facts; and that to give it effect as a loan is to sanction fiction and subterfuge. But no good reason appears either for questioning its legality or denying its effect. The shipper is under no obligation to the carrier to take out insurance on the cargo; and the freight rate is the same whether he does or does not insure. The general law does not give the carrier, upon payment of the shipper's claim, a right by subrogation against the insurers. The insurer has, on the other hand, by the general law, a right of subrogation against the carrier. * * * It is essential to the performance of the insurer's service, that the insured be promptly put in funds, so that his business may be continued without embarrassment. Unless this is provided for, credits which are commonly issued against drafts or notes with bills of lading attached, would not be granted. * * * It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice."

A discussion of this subject is also found in Poor on Charter Parties, Sec. 75, wherein the authorities are reviewed. It is impossible, however, to state the situation and the law thereto pertaining in clearer or more concise language than used by the Supreme Court in the Luckenbach case.

The money received by the American Silk Spinning Company from the Atlantic Mutual Insurance Company was a loan. It was not received as a payment for losses sustained by the spinning company and insured by the policy, nor was it paid by the insurance company with that intention or for that purpose. The wording of the receipts pursuant to which the money was loaned clearly indicate that the money passed as a loan. The trial court expressly so found that the money was received by the spinning company as a loan. (Finding of Fact XVII, Page 33-34 of record.) The receipts, which are in evidence as defendant's Exhibit No. 29 (Printed record Page 661) constitute evidence which fully supports this finding. The trial court, having found that the moneys so advanced constituted a loan, and there being in the record evidence to sustain such finding, the question is not now open to review in this court. It is not a question of law, but a question of fact, and the trial court has found the fact to be that the transaction

was a loan and, as above noted, the matter is not open to review in this court.

II.

THE CONTRACT BETWEEN CHEENEY AND TAYLOR FOR THE MOVEMENT OF THE GOODS FROM TACOMA BY SILK TRAIN IN REFRIGERATOR CARS WAS VALID AND BINDING ON THE DEFENDANT AND NO GOOD SUFFICIENT REASON IS SHOWN FOR DEFENDANT'S REFUSAL TO COMPLY THEREWITH.

The above heading, the Second Conclusion of Law as found by the trial court, is in direct conflict with the Second Conclusion of Law which the plaintiff in error (defendant below) requested the trial court to make as follows: "The defendant is not by any act or omission guilty of any breach whatever of the contract sued on herein."

The trial court found as a fact that there was a contract of carriage made between plaintiff and defendant (Finding of Fact IX, Printed Record P. 30), and as we have hereinbefore noted, there is ample evidence to sustain such finding. Therefore the question is not one which may be reviewed by this court. The trial court found as a conclusion of law that the said contract was valid and binding upon the defendant and no good sufficient reason

is shown by the defendant's refusal to comply therewith. It follows, as a matter of course, that the contract referred to by the court in its Finding of Fact and its Conclusion of Law is the contract upon which this suit was brought.

Plaintiff in error, nevertheless, has assumed that this court will review the question as to whether or not, as a matter of fact, there was any contract, and has devoted a considerable portion of its brief to argument of the matter.

It is contended that the Railroad representative Cheeney had no authority in fact or in law to make a contract on behalf of the Railroad Company with the Silk Spinning Company. Without waiving the position, which we firmly maintain, that the matter is not open to review in this court, we feel that the argument presented by plaintiff in error should be answered.

The defendant contracted to transport the wet waste silk by silk or passenger train service in refrigerator cars, and accepted the wet silk for shipment. The contract consisted of the original bills of lading as supplemented by the oral agreements made between Cheeney for the Railroad Company and Taylor for the American Silk Spinning Company. Cheeney was the defendant's representative on the dock. The trial court found as a fact (Finding IX) that he "was in charge of the dock

and the movement of freight therefrom" and that he was the "Chief Clerk of the Freight Agent at Tacoma". At the time Cheeney and Taylor made the contract, the cargo was on the dock. Cheeney saw the cargo and knew its condition. Cheeney ordered the refrigerator cars brought on to the dock. Cheeney caused several of the refrigerator cars to be loaded with the wet silk. Cheeney quoted the extra charges to be made. Under these circumstances it cannot be urged that Cheeney did not have authority to act for the defendant.

San Antonio & A. P. Ry. Co. vs. Timon, 99 S. W. 418. This was a case to recover damages to certain cattle, caused by reason of the failure of the railway company to furnish cars in which to transport them, in compliance with an oral agreement. The representative of the owner of the cattle stated he told the agent of the railway that he wanted ten or twelve cars in which to ship cattle on June 12th, giving the number of cattle and the point of destination, and the railway agent answered: "All right". The court said:

"That was an oral contract to furnish the cars at a certain date. It is too well settled now to require further discussion that a local agent having the power to contract for the shipment of cattle has also authority to agree with the shipper upon a time at which the cars necessary for that shipment shall be furnished. * * *"

There can be no doubt that an agreement was made by the agent of appellant to furnish the cars.

The court further goes on to quote with approval from an earlier leading case on the subject, and cites a number of cases sustaining the same principle of law, saying:

"In order to properly perform their duties to the public it is absolutely necessary that the agents of a railway company should have the authority to contract for furnishing cars on a certain date, especially in the shipment of cattle. It would be absurd to hold that shippers of cattle could not notify agents of dates on which they desired to ship and have them agree to have the cars ready, but that the shipper must carry his cattle to the station and hold them until the railroad company sees proper to furnish the cars."

In the earlier Texas case of *Easton vs. Dudley*, 14 S. W. 583, the court said:

"There must be a contract as to the time when the freight will be received, otherwise a shipper would never know when to deliver such freight as could be received only on the cars. Such contracts are made daily, and must be made by some one. The question is, who is to make the contract for the company? Naturally the station agent. He is there to represent the company, and does represent it, otherwise the shipper would be compelled to find some general officer clothed with the necessary power, who in most cases would be many miles away from the station. It is the duty of the company to have some one on the ground to represent it in this respect. It cannot be expected that the company should have a general officer at each sta-

tion for this purpose—this would be oppressive, and it would be equally oppressive upon the shipper to require him to make such contracts as must be made with some general officer of the company. * * * Such business must of necessity be transacted by the company's agent, and in fact is so done because it is a necessity. * * * Any reasonable man would naturally suppose that a railroad agent would have the authority almost essential in order for him to accomplish the purposes of his agency."

Other cases to the same effect are:

McCarty vs. Railroad Co., 15 S. W. 164;

Railway vs. Hume, 27 S. W. 110;

Railway vs. Jackson, 89 S. W. 968;

Railway vs. Irvine, 73 S. W. 540;

Chattanooga R. R. C. vs. Thompson, 65 S. E. 285;

Clark vs. Ulster & Delaware R. R. Co., 189 N. Y. 93;

Day vs. Ulster & Delaware R. R. Co., 186 N. Y. App. Div. 601.

Missouri Pacific Ry. Co. vs. Texas & Pac. Ry. Co., 31 Fed. 864.

Fort Worth & D. C. Ry. Co. vs. Strickland, 208 S. W. 410 (Texas Civil Court of Appeals);

Gulf C. & S. F. Ry. Co. vs. Jackson & Edwards, 89 S. W. 968 (T. C. A.);

Gulf C. & S. F. Ry. Co. vs. Irvine & Woods, 73 S. W. 540 (T. C. A.);

Gulf C. & S. F. Ry. Co. vs. Hume, 27 S. W. 110 (T. C. A.);

Railroad Co. vs. Pratt, 22 Wall. 124;
Harrison vs. Missouri Pacific Ry. Co, 74 Mo. 364.

Nichols vs. Oregon Short Line R. R. Co., 24 Utah 83; 66 Pacific 768;

Toledo, Wabash & Western Ry. Co. vs Roberts, 71 Ill. 540.

The general rule is stated in Vol. 10 C. J., P. 218, as follows:

"The station agent, having charge of a railroad company's business at a particular station, has implied authority to contract to furnish cars at a particular time for the shipment of goods, and the company will be bound by such contracts, even though in violation of the company's directions to the agent, if the limitation of his authority is not known to the shipper. * * * The station agent likewise has authority to bind the carrier to furnish a particular kind of cars. * * * It has even been held that such agent has implied authority to furnish cars for shipment to a destination beyond the carrier's line, and that, where the shipper has no notice to the contrary and relies on the appearance of authority, the contract made with the agent is binding on the company. A local station agent also has authority to arrange for loading and receiving cars for transportation."

In the case of *Pittsburgh vs. Racer*, 37 N. E., 380, the court said:

"The public, in dealing with the agent thus acting within the apparent scope of his authority, had the right to rely upon his apparent authority, notwithstanding some unknown limitations upon it."

The defendant having accepted the goods for

shipment under the contract, was bound to transport them, and such acceptance constituted a waiver of any right the defendant might previously have had to refuse to contract to transport the goods.

Cheeney knew the condition of the goods at and before the time he agreed with Taylor to transport the same. It is possible the defendant might have been justified in refusing to contract to transport the goods if it had reasonable grounds to believe that the same were dangerous and unsafe for transportation, but, have contracted to carry the goods, after seeing them and knowing their condition, it is bound to carry out the contract. This is a simple statement of law, and so generally understood and recognized that it is hardly necessary to dwell upon it. It is stated briefly and tersely in Vol. 13, C. J., p. 635, as follows:

"The general rule is that where a person by his contract charges himself with an obligation possible to be performed, he must perform it, unless its performance is rendered impossible by the act of God, by the law, or by the other party, it being the rule that in case the party desires to be excused from performance in the event of contingencies arising, it is his duty to provide therefor in his contract. Hence performance is not excused by subsequent inability to perform, by unforeseen difficulties, by unusual or unexpected expense, by danger, by inevitable accident, by the breaking of machinery, by strikes, by sickness, by weather conditions, by financial stringency, or by stagnation

of business. Nor is performance excused by the fact that the contract turns out to be hard and improvident, or even foolish, or less profitable, or unexpectedly burdensome."

Many cases are cited sustaining the text.

In Hutchinson on Carriers (3d Ed.), sec. 151, the law is clearly stated as follows:

"Although, however the carrier may in these cases refuse to accept the goods, if he take them into his possession for the purpose of carriage, without insisting upon his right to refuse them, he will be considered as waiving it, and consenting to accept the goods upon the usual terms as to liability, and will become responsible as an insurer as in other cases, but to impose upon him such extraordinary liability for goods which, from the nature of his business, he was not bound to carry, or which were in an unfit condition to be carried or which for any reason it would be unfair to require him to carry, an actual acceptance for the purpose of the carriage must be shown; and it will not be done where the delivery is merely constructive."

There can be no question that all of the goods in question were delivered into the possession of the defendant. The defendant owned the dock on which the goods were discharged, and the defendant received the goods from the steamer and piled them on its dock. They came into the possession of the defendant under the through bills of lading above mentioned. It is not a question, therefore, of constructive delivery, for all of the goods in question were actually delivered to the defendant. The question is whether or not the defendant ac-

cepted the goods. We think the proof is uncontradicted that the defendant did accept the goods, with full knowledge of their then condition, and after the making of the contract between Cheeney and Taylor. Not only did the defendant accept the goods, but, in pursuance of the contract, it actually ordered the refrigerator cars in which to transport them, and actually loaded approximately one-half of the goods in the cars. It would be hard to imagine a situation which more clearly than this shows not only an intention to accept, but an actual acceptance.

In the case of *Eastern Ry. Co. vs. Littlefield*, 237 U. S. 140, it appears the plaintiff ordered cars for a shipment of cattle, and the railroad accepted the order. The plaintiff brought the cattle to the station. The cars were not ready, and the court held the railroad company liable for the damages to the cattle, resulting from the failure to furnish cars and transport the same, saying:

"Where, without fault on its part, the carrier is unable to perform a service due and demanded, it must promptly notify the shipper of its inability, otherwise the reception of the goods without such notice will estop the carrier from setting up what would otherwise have been a sufficient excuse for refusing to accept the goods or for delay in shipment after they had been received."

In the case of *Hannibal R. R. Co. vs. Swift*,

12 Wall. 262, the plaintiff placed his baggage in a baggage car, in which car was also loaded ammunition belonging to troops traveling on the same train. The ammunition exploded, and the plaintiff's baggage was burned. The defendant railroad company claimed that there was fighting in the territory through which the railroad operated, and for that reason it would have been justified in refusing the plaintiff transportation. Hence it should not be liable for the loss to the baggage. The court said:

"If at any time reasonable ground existed for refusing to receive and carry passengers applying for transportation and their baggage and other property, the company was bound to insist upon such ground if desirous of avoiding responsibility. If not thus insisting, it received the passengers and their baggage and other property, its liability was the same as though no ground for refusal had ever existed. * * * It is enough to fasten a liability upon the company that it did not insist upon these reasons and withhold the transportation, but, on the contrary, undertook the carriage of men and property without being subjected to any compulsion or coercion in the matter."

In the case of *Pearson vs. Duane*, 4 Wall. 605, it appears that plaintiff had been banished from San Francisco by a Vigilance Committee under pain of death if he returned. In Mexico he boarded defendant's steamer, which was bound for San Francisco, and tendered the fare. The master, learning all the facts, transferred him in mid-ocean to a steamer returning to Mexico. The Court held that the

master, having undertaken to carry the plaintiff, and having raised no objection at the time he came aboard, could not thereafter justify his failure to carry out the contract of transportation, although the facts of the case mitigated the damages.

The court said:

"If there are reasonable objections to a proposed passenger the carrier is not required to take him * * * but this refusal should have preceded the sailing of the ship. After the ship had got to sea it was too late to take exceptions to the character of a passenger or to his peculiar position."

In the case of *Fort Worth, etc. R. R. Co. vs. Strickland*, 208 S. W. 410, it appears the plaintiff gave an order to the railroad agent for a car to be furnished for the shipment of poultry. The agent received the order, but through some difficulties in getting the car, it was not actually furnished until eighteen days after the specified date. It was contended that the order for the car was irregularly placed. The court said:

"A railroad carrier that accepts for transportation goods of a perishable nature, which require cars and equipment of a peculiar kind, undertakes, in the absence of some fact changing the nature of the undertaking, that it has such cars and equipment and that it will properly use them in the transportation of such property."

The judgment was for plaintiff.

The case of *Beard & Sons vs. Illinois Central Ry. Co.*, 79 Ia. 518, was an action against a connecting carrier for damage to butter. The initial carrier shipped the butter in refrigerator-cars. It was transferred to the first connecting carrier, which placed it in an ordinary car for a short haul, and then turned the shipment over to the defendant, which received the cars and transported them as they were, in consequence of which the butter spoiled. The court said:

" We may here assume that defendant will be excused from using refrigerator cars. But it is shown that the butter could have been carried safely by the use of ice in the box cars. It was defendant's duty to use it. But having accepted the butter for transportation, the defendant cannot escape liability for not safely transporting it on the ground that it did not have cars sufficient for that purpose."

The law on this subject is also clearly and briefly stated in Moore, on the Law of Carriers, at page 131, as follows:

"Generally, it may be said that if a common carrier has reasonable grounds for not receiving goods offered to it for transportation, it may do so; but if it once receives them, it will be considered as waiving its right to refuse them and as accepting them in the usual way, and becomes an insurer and subject to all liabilities of a common carrier, in the absence of special limitation of its liability in the contract of carriage."

And in VanZile on Bailments and Carriers, the law is stated as follows:

"But should the carrier accept the goods for transportation in cases where he might properly have refused to receive them, he will be held to have waived his reasonable and legal excuse for not receiving them, and thus becomes liable for any loss of or injury to the property, the same as in case of other goods; in other words, he will be held to have waived his special exemption from liability."

Defendant has failed to show or prove any legal excuse for its failure to perform the contract.

During the trial defendant introduced in evidence a pamphlet containing certain Interstate Commerce Commission Regulations relating to the transportation of explosives and other dangerous articles by freight and express. This pamphlet was published July 15, 1918, and the regulations therein contained respecting the particular matters hereinafter mentioned, were to become effective on September 1, 1918. The pamphlet in question was introduced in evidence as defendant's "Exhibit No. 25" and it is stipulated in printed record (P. 493) that the rules contained in the pamphlet did not become effective until September 1, 1918. There is also evidence in the case defendant's "Exhibit No. 25-A" which are the rules and regulations relating to the transportation of certain commodities in force under the orders of the Interstate Commerce

Commission of date October 1, 1914, being Rules 1801, 1803 and 1838, as set forth in said pamphlet, "Exhibit No. 25-A". These are the rules which were in effect at the time. It is contended that the contract of carriage in question is void and illegal because the same, in some manner not clearly pointed out, conflicts with certain of the above noted rules of the Interstate Commerce Commission in effect at that time.

The trial court found as a fact (Find XI, Printed Record P. 31) that the contract " was not prohibited by any regulation of the Interstate Commerce Commission" and such finding is not open to review in this court.

Much was said by plaintiff in error (defendant below) during the trial of the case, and much is said in their brief in this court concerning the effect of these provisions of the rules of the Interstate Commerce Commission upon the contract of carriage in question. Nowhere, however, has plaintiff in error pointed out any rule of the Interstate Commerce Commission in effect at the time which rendered void or illegal this contract of carriage.

The court's attention was particularly called to Sec. 1800, which states that for transportation purposes, dangerous articles other than explosives are divided into the following groups:

(1) Forbidden articles.

(2) Acceptable articles.

Section 1801 then proceeds to enumerate certain forbidden articles, amongst which we find:

(d) "Rags or cotton waste oily with more than five per cent of vegetable or animal oil, or wet rags, or wet textile waste, or wet paper stock."

This particular portion of the regulations was called to the attention of Dr. Arthur D. Little, a witness for plaintiff, at the time his deposition was taken on January 7, 1921. It is not necessary to quote from his deposition to show his education, experience and general knowledge in matters pertaining to the textile industry, and particularly to the chemical side of the industry. Suffice it to say that no witness has been produced who is possessed of a greater experience in and knowledge of the chemistry of the textile industry.

In his deposition, at Rec. p. 204, it appears the regulation above quoted was read to him, and he was asked the question as to whether or not Canton steam silk waste could properly or reasonably be qualified under any of the words used in the quoted regulation. In reply he stated:

"It is certainly not to be qualified as rags or cotton waste oily with more than five per cent of vegetable or animal oil, since the Canton steam

silk waste contains practically no oil, and has, moreover, not been processed in any such sense as rags or cotton waste. Neither can it be classed as wet rags or wet paper stock, nor as wet textile waste, for the reason, in the latter case, that it bears the same relation to cotton or other textile waste of that raw cotton or cotton linters does to the waste of the textile mills. It is in fact, although called a waste, a valuable and well recognized raw material for an important manufacture."

In describing cotton linters he states:

"In the operation of ginning cotton there is left behind a certain proportion of shorter fiber, which, when separated from the seed, is known as linters."

He defined Canton steam silk waste as follows:

"Canton steam silk waste is the product of the initial treatment of the cocoons in China, and consists of pieces of cocoons or material which otherwise cannot be drawn off into the filature."

He further states that Canton steam silk waste bears the same relation to raw silk as cotton linters bears to raw cotton. That silk waste contains the shorter fibers produced from the cocoon, and that it contains generally the same chemical materials as raw silk, and that it is the same material chemically.

It seems almost ridiculous to speak of Canton silk waste as being "textile waste". Textile waste is commonly known to be waste, or practically worthless scraps, sweepings and other useless or worthless remnants which accumulate in the process of

the manufacture of fabrics in the mills. Canton steam silk waste is not a worthless by-product, but a very valuable raw material. It does not accumulate during the process of the manufacture of silk fabrics in the mills. It is raw material. Naturally, silk in its raw state, is divided into classes or grades, the same as wheat or logs or other well known commodities. The mere fact that the word "waste" is used in the name "Canton steam silk waste", does not mean that the material is a "Textile Waste". No one would think of calling No. 2 grade wheat or logs worthless, nor would any one call No. 2 grade wheat "Waste Wheat" or "Wheat Waste".

It seems useless to prolong this discussion, as no witness has attempted to classify Canton steam silk waste of the kind and character involved in this suit, as "Textile waste".

Even though it were textile waste, the Interstate Commerce Commission Regulations in effect at the time did not prohibit its being shipped in its then wet condition.

Defendant seeks to excuse itself for failure to perform its contract to transport the silk in refrigerator cars, silk train service, because it believed there was danger of spontaneous combustion. This is no excuse at all. If it had any such be-

lief, or even reasonable grounds to entertain such a belief, it should have stood its ground and declined to contract to transport the materials and to receive and accept them for transportation. Having agreed to transport the goods with knowledge of their then condition, and having actually accepted the goods pursuant to such contract, it waived any right it might previously have had to decline to transport the goods for the reason it believed them liable to spontaneously combust.

Having contracted to transport the goods and having accepted them for transportation, it was bound to perform its contract. It cannot then offer the excuse that it believed there might be some danger from spontaneous combustion.

The question of whether there was any danger from spontaneous combustion is not open to review in this court. The trial court in its Finding of Fact XI (Printed Record P. 31) found "that at the time said 867 wet bales were accepted for shipment, as aforesaid, and at all times thereafter, the same were properly packed and in condition for safe transportation by defendant from Tacoma to destination by silk or passenger train service in refrigerator cars." There was ample evidence to sustain such finding. It is, therefore, an established

fact of the case and is not open to review in this court.

The facts in the case of *Spokane Valley Union vs. Spokane R. R. Co.*, 103 Wash. 587 (175 Pac. 184), are somewhat simlar to the facts involved in this case.

In the Spokane case the railroad company was held liable because, after a car which it furnished the shipper, was loaded by the shipper with apples, it refused to transport the fruit, because it thought the fruit was frost-bitten. The court said:

"It is apparent from this statement of the facts that after the apples were loaded on the car which was furnished by the appellant to the respondent, under Option No. 2, a dispute arose between the shipper and the agent of the carrier as to whether or not the apples had been frost-bitten. The carrier contended that the apples had been frost-bitten, and the shipper contended that they had not been frost-bitten. * * * The carrier refused to carry the apples. * * * The shipper thereupon offered to indemnify the appellant and its connecting carrier against any claim that might be set up against either by reason of any frost damage prior to the loading of the fruit. This offer was declined and the fruit was not shipped. The appellant argues that it had the right to make reasonable rules and regulations with reference to the carriages of fruit; that, when its inspectors found that part of the fruit had been frost-bitten, it had a right to have this notation made upon the bill of lading. If we may assume that, appellant could refuse to ship the fruit without a statement of its true condition. The claim that a part of the fruit was frost-bitten was

disputed by the shipper, which offered to indemnify the carrier against any claim for damage on that account. Under these circumstances, we think it was the duty of the carrier to accept the fruit and to carry it as requested by the respondent. The appellant is a common carrier of freight. It was bound to take all freight which was offered."

3. PLAINTIFF IS ENTITLED TO HAVE AND RECOVER FROM DEFENDANT DAMAGES IN THE SUM OF $105,622.90 WITH COSTS TAXED IN THIS ACTION, AND THAT A JUDGMENT IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANT SHALL BE ENTERED ACCORDINGLY.

The above is the third conclusion of law as made by the trial court (see printed record pp. 44-45). The making of such finding by the trial court is objected to by plaintiff in error as its assignment of error No. XXXII (see brief of plaintiff in error p. 32).

The plaintiff in error requested the court to make the following conclusion of law:

"The defendant is entitled to have a judgment in its favor that the plaintiff take nothing by its action herein,"

which conclusion of law the trial court refused to make, and to such refusal the defendant excepted and now assigns as error (assignment of error XVI, brief of plaintiff in error, p. 24).

It is manifest if the trial court was correct in making its conclusions of law Numbered 1 and 2, which are briefly to the effect that plaintiff is the real party in interest and entitled to maintain this suit, that the contract sued upon is valid and binding and no good and sufficient reason is shown from defendant's refusal to comply therewith, that the third conclusion of law as made by the trial court to the effect that the plaintiff is entitled to have and recover judgment from the defendant must stand, and it is not necessary to present any argument upon the matter.

WHEREFORE, having, as we believe, satisfactorily shown to this court that all of the findings of fact as made by the trial court were supported by competent evidence, and that the conclusions of law as made by the trial court should stand, and that the judgment in favor of plaintiff against defendant was properly entered, we respectfully urge that the judgment of the trial court should be affirmed.

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No. 3845

United States

Circuit Court of Appeals

For the Ninth Circuit.

JAMES C. DAVIS, as DIRECTOR GENERAL OF RAILROADS, Operating the Chicago, Milwaukee & St. Paul Railway, and AGENT Appointed Under the Transportation Act of 1920,

Plaintiff in Error,

vs.

AMERICAN SILK SPINNING COMPANY, a Corporation,

Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Southern Division.

REPLY BRIEF OF PLAINTIFF IN ERROR.

GEO. W. KORTE,
C. H. HANFORD,
Attorneys for Plaintiff in Error.

No. 3845.

United States

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For the Ninth Circuit.

JAMES C. DAVIS, as Director General of Railroads, Operating the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY, and Agent Appointed Under the Transportation Act of 1920,

Plaintiff in Error,

vs.

AMERICAN SILK SPINNING COMPANY, a Corporation,

Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Southern Division.

REPLY BRIEF TO THE BRIEF FILED IN BEHALF OF THE DEFENDANT IN ERROR.

A considerable part of the argument contained in the brief on behalf of the defendant in error is devoted to an effort to restrict the review of this case by this Court on technical grounds. The real contention of the defendant in error being that this Court is concluded by the findings of fact made by the Trial Court. All of the brief, extending from page 6 to page 16 thereof, amounts to a mere discussion of what may be reviewed by this Court. To all this it is a sufficient reply to say that, by its decision rendered in the case of Societe Nouvelle D'Armement vs. Barnaby, 246 Fed. 68, this Court has saved the right to review judgments based on special findings that are not supported by competent evidence. That decision of this Court being a sufficient and complete answer to all that is contained in that portion of the brief referred to.

In a further attempt to confine the review of this case within narrow limits, it is claimed that the assignments of error not specifically referred to in the argument on our side may be excluded from consideration as having been abandoned. In reply we merely assert that our effort to make a comprehensive argument of all material questions in the case without being tedious cannot be fairly construed as an abandonment of any question that is material. The assignments of error are specific and touch all the details of the case, and are sufficient to preclude any snap judgment being taken against us on the pretense that a particular point has not been saved by being assigned as error.

That our position may be clear, a short answer to our adversaries' contentions respecting each of the Court's findings to which exception has been taken will now be given:

Exception No. XVII, referring to the Court's finding No. III, our exception being to the finding of the Court that 500 bales of damaged silk waste were of the quality known as No. 1 Canton Steam Silk Waste. To meet this exception the brief quotes testimony, and all of the testimony to be found in the record relating to the numbers respectively of Number 1 and Number 2 qualities of silk waste. This is found in the deposition of Edward W. Lownes, who, by his own testimony and other testimony, is shown affirmatively to have been incompetent to give the testimony quoted because he did not have knowledge on the subject. In answer to a question whether he had opened any bales to test them Mr. Lownes gave the following answer:

> "It didn't come in bales. Came in a large matted mass like manure, smelled very strong and I didn't want to handle it very much myself." (Rec., p. 134.)

Charles E. Burling, a witness for the defendant in error, testified that he was the auctioneer who sold the damaged goods at auction, and his testimony is as follows:

> "Q. What was the physical condition of the silk? A. In very bad shape, wet, tangled—it was assumed that there are 867 bales, but no

> mortal man could tell whether there were 8,000 or 800—I will modify that; no mortal man could possibly testify how many there were. Q. The bales were broken? A. All broken the worst, almost, I ever saw, and we had to get some outside help, our men would not handle it, absolutely refused because of the odor and the difficulty. The condition was so bad that it would take 2, 3 or 4 men 15 minutes to half an hour to unwind a long skein, pull it out, otherwise you would have to cut it; it was so badly tangled that I had great difficulty in handling it and then the odor drove away most of the buyers as well as the laborers."

Finding No. VIII: The exception taken is on grounds similar to the preceding, our contention being that there was no competent evidence by a witness who knew the facts to prove the number of bales of each of the 2 grades.

To meet our exception to finding numbered IX, the testimony of witnesses Taylor and Alleman are quoted, and in the brief it is said:

> "The Trial Court having carefully examined the evidence, prepared this finding and expressed it in its own language. A careful comparison of the words of the finding with the testimony of several witnesses in support of it will show that the finding is practically a reiteration of the exact words of the witnesses whose evidence supports it."

It is true that this finding is more in the nature of a recital of some testimony than a declaration of a fact, but instead of being an exact recitation it varies, words are interpolated by the Court which are not in the testimony and statements contained in the testimony are not in the Court's recital, and

in those discrepancies are to be found error prejudicial to the plaintiff in error of sufficient gravity to require a reversal of the judgment. Displaying those errors we place finding No. IX in a parallel column with the testimony of Mr. Taylor.

IX.

That the 133 bales of waste silk which had not been wet with salt water were in due course transported by defendant to destination.

That the remaining 867 bales which had been wet with salt water were discharged on the dock which dock belonged to the Chicago, Milwaukee & St. Paul Railway Company, and was then being maintained and operated by defendant as a part of said railway system.

That after the vessel had commenced discharging the wet silk, Mr. Taylor, the representative of the underwriters and owners thereof, called on Mr. Cheeney, the chief clerk of the freight agent at Tacoma, and who was in charge of the dock and the movement of freight therefrom, and told Mr. Cheeney that he was very anxious to have quick dispatch of the wet silk, and that it was important that it should go forward in its wet condition. Cheeney and Taylor looked at the silk as it was being discharged from the vessel and placed on the dock, and Taylor requested that it be forwarded by silk train service in refrigerator-cars, *and Cheeney agreed to so forward it,* stating that the cost of such service would be $7.50 per hundred pounds as against the bill of lading freight of $1.75 per hundred, and that there would be an additional charge for refrigeration of approximately $21.00 per car to pay, *all of which Taylor agreed to.* On August 14th, Taylor again called on Cheeney to see how the matter was progressing, and he and Cheeney again examined the silk, and Taylor was told by Cheeney that the cars had been ordered and would be brought in shortly, and thereafter the cars were brought in, and approximately one-half of the wet silk bales were loaded on two or more refrigerator-cars for shipment.

TESTIMONY OF FRANK G. TAYLOR.

"A. I asked Mr. Cheney if it would be possible to forward the silk by silk train service, and he said that it would. I asked him if it could go in refrigerator-cars and he said that it could. After that we talked generally, possibly, for a few minutes and then Mr. Cheney and I walked down to the end of the wharf. The silk was coming out of the ship at that time and was piled between the two warehouses, between No. 1 and No. 2. By piling, I do not mean to say that one bale was on the top of the other. It was standing on end. We looked over the silk and looked over some of the other cargo that was coming out, and then walked back to the office—to his office. When we got back to his office I asked Mr. Cheney what it would cost to send that by silk train service, and he told me that it would be $7.50 per hundred, as against $1.75 for the bill of lading rate.

"Q. $1.75 had been prepaid? A. $1.75, as I understand it, had been prepaid; and I inquired regarding the cost of refrigeration, and he told me that it would (73) cost, approximately, $21.00 a car—the icing. I discussed with Mr. Cheney the importance of keeping the cargo wet while it was on the wharf and en route, and it was arranged to have a man go there and hose it down, and that was done, and I left Mr. Cheney then and I went back to Seattle. * * * A. I went over to Tacoma on the 14th. I went over there that day to see just how things were getting along, and everything was all right; progressing. Mr. Cheney told me that the cars had been ordered to be brought in shortly. I went down and looked at the silk with Mr. Cheney, and some of the bales, the heat had gone out of the bales entirely; others were still warm; and I went back to Seattle again. * * * A. I went over on the 16th, figuring that I would find the cars loaded and ready to go out. I went and called on Mr. Cheney and was told that Mr. Wilkinson, whom I understood to be the assistant freight agent of the Milwaukee road in Chicago, had been there on the previous day and I don't know whether he stopped the loading of the cars, *but he said that they could* (74) *not go forward.* * * * A. The assistant claim agent, yes. I was very much surprised and expressed myself to Mr. Cheney that way, *who told me that he could do nothing, and suggested that I see Mr. Alleman.* * * * A. Yes; I went to see Mr. Alleman *and Mr. Alleman told me that the only one that could overrule Mr. Wilkinson was Mr. H. B. Earling, the vice-president of the road in Seattle.* * * * A. I went in to see Mr. Barkley and went over the whole situation with him; telling him how I had gone over to Tacoma—that I was one of the first ones to get there and we had been promised prompt dispatch, and the importance of getting this silk east as promptly as it possibly could get there, *and told Mr. Barkley that we would be willing to pay the expenses of one man, or two men, to accompany that shipment east for the purpose of keeping it wetted down, and inspecting it at the stations, if necessary, and for icing, to see that it was properly iced.* I told him that we would also be willing to give the railroad company an undertaking to hold it harmless for any further damage that might occur to the silk waste by reason of its having been forwarded in its present condition. Mr. Barkley told me that he would communicate with Mr. Earling. I told him also that if he would telephone over to Tacoma I was very sure that Tacoma would confirm what I said as to the heat diminishing in the bales.

"In a few minutes Mr. Barkley left me, excused himself and went out of the office, and I was there at that time, possibly fifteen minutes, when he came back and I asked him if he had telephoned over to Tacoma, and he said that he had and that they confirmed what I said regarding the diminishing of the heat in the bales; and I left Mr. Barkley then, waiting for him to report to me after he had heard from Mr. Earling.

"That was on the 17th. On the 19th I called on Mr. Barkley again. He had heard nothing from Mr. Earling. On the 20th I called on Mr. Barkley—he had heard nothing then.

"On the 21st I called on Mr. Barkley, and he told me that (76) the road had decided to forward this freight—to forward the waste; and on the 22d—

"Q. (Interposing.) This was the day following?

"A. The day following, I went over to Tacoma again and saw Mr. Cheney and arranged for the forwarding of the silk in the manner that we had previously arranged."

To sustain the findings in paragraphs X and XI, evidence is cited that falls far short of proof of what those paragraphs are intended to affirm. The vitals of the case are contained in those paragraphs and unless they are entirely true the judgment must be reversed and the case dismissed.

Error mingled with truth in a single proposition or statement of fact taints it so that the whole must be regarded as being entirely false. The evidence cited to sustain those two paragraphs is limited to proof of the fact that bales of the wet silk were loaded on cars and unloaded again. But instead of these simple facts the findings are compound statements of matter affecting the ultimate conclusion which is entirely untrue. Those two paragraphs need to be analyzed. Paragraph X begins with the statement "that *thus* contracting for and accepting all of said 867 bales of wet waste silk for transportation *as aforesaid,*" and it concludes with the words "all contrary to the terms and requirements of the *aforesaid* contract of carriage." Finding XI begins with the statement "that at the time said 867 wet bales were accepted for shipment *as aforesaid* and at all times thereafter, the same were properly packed and in condition for safe transportation by defendant from Tacoma to destination by *silk or passenger train service in refrigerator-cars,* and such transportation was not prohibited *by any regulation of the Interstate Commerce Commission.*"

Both these findings are predicated upon false premises by the apparent reference thereto of some-

thing antecedent as being a contract or agreement; they falsely assume that the conversations between the witness Taylor and Cheney constituted a consummated agreement or contract. That assumption is not warranted for the reasons hereinbefore shown; and further, because the terms and effect of the assumed agreement are undiscoverable. The finding XI says that the goods were properly packed and in safe condition for transportation: How? That is by silk *or* passenger train service. The disjunctive "or" leaves the assumed agreement indefinite and uncertain. Furthermore, the method of transportation by passenger or silk train service is a matter that is indefinite and uncertain, the finding is merely suggestive of an unwarranted assumption that the transportation business of railroads is so conducted that merchandise may be carried in carload lots by passenger trains, or that "silk train service" is a phrase which in and of itself defines a particular method of transportation. If the agreement was for transportation by a passenger train the Court must visualize the extraordinary condition of a passenger train being subjected to the burden of hauling a number of freight-cars loaded with damaged goods requiring for the preservation thereof periodical stoppages for wetting, that is, by drenching the bales, so disorganizing the passenger service that those having tickets entitling them to a continuous journey to meet their business engagements would be delayed while the necessary care was being bestowed upon the freight-cars. It must

be kept in mind that the wet silk had to be moved over connecting lines all the way from Tacoma to Providence, R. I. The testimony shows that for the necessary wetting of the damaged bales there would be twenty stoppages between Tacoma and Chicago, each stoppage involving a delay of four hours, or one hour to each car; that is, it would take one hour's time for wetting each of the four carloads, or something over three days. See testimony of Brown (Record, pp. 386, 387).

The evidence cited gives no information with regard to the requirements for silk train service. (Here a slight digression for the purpose of explanation is permissible. The transcontinental lines of railway catering to Oriental commerce render special service in the transportation of cargoes of tea and silk brought to the coast by ocean carriers. A tea train or a silk train furnished for quick transit necessarily involves a heavy expense, the amount being prohibitive except when a sufficient number of carloads can be collected to move in one train, not less than seven in number. (See testimony of Brown, Record, p. 387.) The conditions for this special service and the rates are covered by the tariffs filed as required by law with the Interstate Commerce Commission, but they do not provide for the extraordinary attention and services exacted in this case by Mr. Taylor in his conversations with Cheney and with Barkley.) This point is explained in the testimony of Brownell (Record, pp. 511 to 516). Finding XI concludes by stating

that the extraordinary services required under the fictitious agreement made with Cheney was not prohibited by any regulation of the Interstate Commerce Commission; that is a gratuitous statement for which no purpose can be discovered unless it be to befog the case. As a matter of fact, the regulations of the Interstate Commerce Commission contained in Exhibit No. 25 (Record, pp. 492, 493), do prescribe that certain commodities, including "textile wastes," must not be offered for shipment when wet. That regulation had been promulgated and was a guide and a warning to the agents of the railway. But irrespective of any regulation or lack of regulation by the Interstate Commerce Commission, higher authority, that is to say, the interstate commerce law enacted by Congress in section 6, contains the positive prohibition against all such special agreements on the part of railway carriers for extraordinary service in the transportation of merchandise so that the assumed agreement, if it had been actually consummated, and was full and explicit in all of its details, would have been unlawful and absolutely void.

Pages 34 to 46, inclusive, of our adversary's brief, is devoted to recitals and some quotations of testimony relating to the condition of the 867 bales, all of which instead of proving the same to have been in normal condition and fit for transportation, proves the contrary. By the most liberal interpretation of that testimony the Court can find only expressions of opinions with regard to the fitness of

the stuff for transportation, the effect of which is entirely nullified by the statement on page 34 of the brief, "that the bales were in condition for safe transportation from Tacoma to destination by silk or passenger train service in refrigerator-cars." The converse of that proposition is that the stuff was not in fit condition for transportation otherwise than by *special service* by a silk or passenger train in refrigerator-cars. Therefore, the 867 bales in the condition in which they were tendered for transportation were not in the good order which the bill of lading contracts specified as essential to acceptance for transportation by the railway carrier.

These two findings, X and XI, are the basis for the Court's conclusion of law in paragraph 2 thereof (Record, p. 44), which follows:

> "That the contract between Cheney and Taylor for the movement of the goods from Tacoma by silk train in refrigerator-cars was valid and binding on the defendant and no good sufficient reason is shown for defendant's refusal to comply therewith."

And that conclusion is the basis on which the judgment of the Trial Court is rested. There is no pretense in the pleadings, arguments of counsel or findings of the Court that the bill of lading contracts were not fully performed on the part of the railroad carrier. Instead of that, a special contract is set up: a contract by and between whom? Why, a contract between Cheney and Taylor, and the record is destitute of any scintilla of evidence tending to prove that either one of them had any au-

thority whatever to represent or bind either party to the record in this case. But if it were a contract to which the plaintiff in error was a party by which he had attempted to make a special agreement for extraordinary services not covered by the tariffs on file, the action would be without any legal foundation whatever, because railroad transportation service in the United States is regulated by an Act of Congress that is positive and emphatic in its provisions and required to be enforced with rigor. On that subject the pronouncements of the Supreme Court of the United States leave no ground for courts of lesser authority to adjudicate rights otherwise than in accordance with the rule of "thus saith the law."

In our opening brief some of the Supreme Court decisions are cited on page 44, and it is a significant circumstance, amounting to a confession of error, that our adversary's brief makes not the slightest reference to any of those decisions. The main purpose of the Interstate Commerce Law was to eliminate entirely from all transportation transactions the vice of rebating and discriminat*u*on by means of specific contracts. Interstate Commerce Act, section 3, provides:

> "It shall be unlawful for any common carrier subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality or any particular description of traffic in any respect whatsoever."

And section 6 provides:

> "1. That every common carrier subject to the provisions of this act, shall file with the commission created by this act, and print and keep open to the public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad * * *
>
> "7. No carrier shall engage or participate in the transportation of passengers or property as defined in this act unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, *or for any service in connection therewith;* between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time."

Giving effect to this provision of law, the Supreme Court, in the case of Atchison etc. Railway Co. vs. Robinson, 233 U. S., pp. 173–180, after citation of preceding decisions of the Court, said:

> "We regard these cases as settling the proposition that the shipper as well as the carrier is bound to take notice of the filed tariff rates and that so long as they remain operative they are conclusive as to the rights of the parties, in the absence of facts or circumstances showing an attempt at rebating or false billing. (Great Northern Ry. vs. O'Connor, 232 U. S. 508.)
>
> "To give to the oral agreement upon which the suit was brought, the prevailing effect al-

lowed in this case by the charge in the Trial Court, affirmed by the Supreme Court of the state, would be to allow a special contract to have binding force and effect, though made in violation of the filed schedules which were to be equally observed by the shipper and carrier. If oral agreements of this character can be sustained, then the door is open to all manner of special contracts, departing from the schedules and rates filed with the Commission."

Kansas City Southern Ry. Co. vs. Carl, 233 U. S. 652.

"To maintain the supremacy of such oral agreements would defeat the primary purposes of the Interstate Commerce Act, so often affirmed in the decisions of this court, which are to require equal treatment of all shippers and the charging of but one rate to all, and that the one filed as required by the act."

(233 U. S. 172, at page 181.)

That decision of the Court denied the right of a shipper to recover damages for breach of an oral agreement or contract on the part of the station agent for the transportation of a race-horse by failing to forward the animal by the train and within a time especially agreed upon, time being the essence of the contract and necessary to enable the animal to participate in a race scheduled for a particular time, there being no tariff provided for such special service.

The case of Southern Railway Company vs. Prescott, 240 U. S. 632, was an action brought to recover for the loss of nine boxes of shoes which were destroyed by fire while in the possession of the Southern Railway Company. The boxes had been

shipped at Petersburg, Va., by the Seaboard Air Line Railway and connections, consigned to defendant in error at Edgefield, Carolina, had arrived at Edgefield on the line of the Southern Railway Company. The plaintiff alleged three causes of action against the railway company (1) as common carrier, (2) as warehouseman, and (3) for penalty because of failure to adjust and pay the claim, after notice, as provided by law. The plaintiff recovered a judgment in the Trial Court, which the Supreme Court reversed. The loss was caused by a fire which destroyed the warehouse in which the goods were stored. There was nothing in the circumstances to indicate neglect on the part of the railway company. In reversing the judgment the Court held that the case was not covered State law but the measure of the carrier's liability under the bill of lading involved a federal question. On page 638, the Court said:

> "It is also clear that with respect to the service governed by the Federal statute the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates (Tex. & Pac. Rwy. vs. Mugg, 202 U. S. 242; Kansas Southern Railway vs. Carl, 227 U. S. 639, 652; Boston & Maine R. R. vs. Hooker, 233 U. S. 97, 112; Louis. & Nashville R. R. vs. Maxwell, 237 U. S. 94), and the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services within the purview of the act. Chicago & Alton R. R. vs. Kirby, 225 U. S. 155, 165; Atcheson etc. Ry. vs. Robin-

> son, 233 U. S. 173, 181. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations. No carrier may extend 'any privileges or facilities' save as these have been duly specified."

The Kirby case, 225 U. S. 155, was an action in *assumpsit* to recover damages for breach of a special contract for the shipment of a carload of high-grade horses from Springfield, Illinois, to New York City. A verdict and judgment in favor of the plaintiff for damages was affirmed by the Supreme Court of Illinois, but reversed by the Supreme Court of the United States, which held that special contract to be invalid under the Interstate Commerce Act. As stated in the opinion of the court by Mr. Justice Lurton:

The facts essential to be stated were that Kirby was engaged in developing high-grade horses and desired to send a carload to be sold at a public sale to be held in New York City. Several routes were available, and the published livestock rates for carload shipments were the same by each route. It was very desirable to send them by the route that would insure their arrival in the shortest time after delivery to the carrier. That the railroad company had established and published their joint rates and charges upon carload shipments of livestock to New York was not disputed. The rates furnished defendant in error were the regular published rates, but those rates and schedules did not provide for an

expedited service, nor for transportation by any particular train.

The opinion states:

> "The single Federal question arises upon the validity of the contract to so carry these horses as to deliver them at Joliet to be carried through to New York by the Horse Special, leaving Joliet on the 25th of January."

The opinion cites the provisions of the Interstate Commerce Law and then states the law applicable to the case in view of the statutory law:

> "The implied agreement of a common carrier is to carry safely and deliver at destination within a reasonable time. It is otherwise when the action is for a breach of a contract to carry within a particular time or make a particular connection, *or to carry by a particular train.* The railroad company, by its contract, became liable for the consequence of a failure to transport according to its terms. Evidence of diligence would not excuse. If the action had been for the common-law carrier liability, evidence that there had been no unreasonable delay, would be the answer. But the company, by entering into an agreement for expediting the shipment came under a liability different and more burdensome than would exist to a shipper who made no special contract.
>
> "For such a special service and higher responsibility, it might clearly exact a higher rate, but to do so it must make and publish a rate open to all. This was not done.
>
> "The shipper, it is also plain, was contracting for an advantage which was not extended to all others, both in the undertaking to carry so as to give him a particular expedited service, and a remedy for delay not due to negligence.

"An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs, and for a breach of such a contract, relief will be denied, because its allowance without such publication is a violation of the Act. It is also illegal, because it is an undue advantage in that it is not one open to all others in the same situation. * * *

"The broad purpose of the Commerce Act was to compel the establishment of reasonable rates and their uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the defendant in error. To guarantee a particular connection and transportation by a particular train, was to give an advantage or preference not open to all, and not provided for in the published tariffs. The general scope and purpose of the act is so clearly pointed in New York N. H. & H. Railroad Company vs. Interstate Commerce Com., 200 U. S. 361, 391, and in Texas & P. Railroad Company vs. Abilene Cotton Oil Co., 204 U. S. 426, as to need no reiteration."

The entire XIII finding relates to the process of drying the wet silk waste, which was undertaken and contracted for by Mr. Taylor representing, as he says, the underwriters and owners. The bare statement of the proposition that the natural and proximate result of the drying of the bales was a weakening of the fibre and discoloration is so contrary to common sense that it might be dismissed as an absurdity. It is in fact comparable to blaming a surgical operation necessary for the cure of an ailment as the cause of the pain. The silk waste

was a commodity for use in a dry state, and the drying of it was a process which if not antecedent to shipment would have been certainly necessary before any use could be made of it. As to its having been done in a reasonable and proper manner, we refer to the testimony of H. Meyer (Record, 427, 428), by which it is shown that the process of drying was to open up the bales, a part of them at a time, and spread the material out in the open air, and it was frequently rained upon. Later, the process was conducted in a room equipped as a dry kiln.

The reasonable and most proper method of conducting the process of drying was described in the testimony of Dr. H. K. Benson (Record, pp. 505, 506), as follows:

> "Q. Now, Doctor, taking into consideration this cargo of wet silk in a saturated condition as it came out of the hold of the ship, and if you were required to recondition it, what would you want done the first thing in order to recondition it so as to ship it?
>
> "A. Well, I think there are three methods. The natural one would be to dry it, I think, in a dry kiln—kilns that are prepared; and open up the bales as much as possible and put them in and keep them apart with good circulation of air, and washing it carefully.
>
> "Q. Are there dry kilns around this territory?
>
> "A. Yes. The other method, I think, would be to freeze it absolutely solid; and the third method, I think, would be to send it in a tank immersed."

Referring to finding XIV, the difference between the finding requested by the plaintiff in error as set out in assignment of error No. X (Record, p. 602), and the Court's finding is that our request was for the Court to find according to the exact figures contained in the deposition of Mr. Lownes, which is the only testimony fixing the values. Mr. Lownes was the President of the American Silk Spinning Company, the plaintiff suing in the case, and if his own testimony is not conclusive as to the values of the silk in its undamaged condition and the amount to be subtracted for injury resulting from the marine disaster in which it was submerged in salt water, then there is absolutely no evidence fixing those values. The Court's finding is based, not on evidence, but on the argument of attorneys for the defendant in error in which they are obliged to substitute for the testimony of their own witness their own arbitrary conclusion as a basis for the statement of values which they made up and which the Court adopted. Arguing around the circle, they say, on page 58 of their brief, that their figures "are the exact figures as found by the Trial Court." On page 56 of their brief, they say: "Mr. Lownes endeavored to state in exact dollars and cents the value of the silk in question at New York, but it is very manifest that the total amounts, as given by him, *are incorrect,* and that through inadvertence, he computed the value of the bales of number one silk at eighty-seven cents per pound, which he testified was the value of the No. 2 silk, and that through

like inadvertence, he computed the value of the bales of No. 2 silk at $1.51 per pound, which was the value of the No. 1 silk. *It is rather unfortunate* that this error in computation of values was made."

That deposition was taken several months prior to the trial of the case, and there was ample time for correction of any inadvertent errors so that when the case was submitted to the Trial Court on that evidence, there was nothing else for the Court to do but to find accordingly, or reject the evidence as untrue, and it would make very little difference in the final outcome of this litigation whether this Court shall adopt the figures given by Mr. Lownes or cut out his deposition on the subject.

To sustain the Court's finding No. XV, there is nothing in the case except Taylor's testimony as to what Cheney told him would be the extra charges that would be exacted for performing the special services which Taylor required.

The Court's finding No. XVI as to the result of the failure of the defendant to perform its alleged contract to transport the 867 bales in a wet condition is flatly contradicted by the allegations of the complaint, which states that the natural and approximate result of the drying caused the delay complained of.

Finding No. XVII: The question involved in the exception to this finding is whether the insurer paid the loss covered by the policy of insurance. The defendant got the money as shown by the receipts given and admissions made in various ways through-

out the case in the pleadings, the evidence and the arguments. There are two reasons why we deny that that money was loaned: One is that the payment discharged the liability, and the other is that the plaintiff did not become subject to any liability as a borrower by being obligated to repay. The subterfuge of a loan is altogether predicated upon the phraseology in the receipts given, amounting to a promise to refund out of proceeds of the collection. By that arrangement, if the defendant in error fails to collect damages in this action, the insurer will not get a refund, and if the plaintiff in error shall be obligated to pay on account of the damages sued for, the defendant in error will not be benefited.

The iniquity of this case is clear; by a maritime disaster, merchandise in transit was damaged by being submerged in the hold of a stranded vessel. If the matter had ended there, there would have been only the liability of the insurer to recompense the owner of the goods. By the salvaging of the goods, the insurer became the gainer to the extent of the value of what was saved, and that is all.

But greed to profit from calamity inspired these New York financiers to instigate this lawsuit, and against that unholy conspiracy we invoke the power of this Appellate Court to reverse the judgment brought here for review.

Answering all of the arguments on the point as to the liability of railroad carriers for damages when they fail to perform contracts made in their behalf

by their station-agents and the authorities cited in the brief for the defendant in error, it is enough to say that contracts by agents within the scope of their apparent authority which are not tainted with illegality are binding upon their principles. For the failure to perform such contracts, liabilities for damages attach; that is a principle of law which we have not assailed. But this is a case where damages are claimed for breach of a carrier's contract by failure to perform an alleged contract which was never consummated between the carrier and the defendant in error acting through any agent having authority, or apparent authority, or pretending to have authority to make it, and which, if formally entered into by whomsoever may have assumed the authority, would be void because denounced by the laws enacted by Congress and the decisions of Courts of highest authority in this country.

In their brief, counsel for the defendant in error makes the vain attempt to avoid the decision of the Supreme Court of the United States in the case of Luckenbach vs. McCahan Sugar Refining Company, 248 U. S. 139, by quoting at length from the opinion of Mr. Justice Brandeis.

In some respects the Luckenbach case was like the pending case. It was a suit by a shipper against the carrier to recover damages for injury to a cargo in transit under a bill of lading contract containing a clause entitling the carrier to the benefit of insurance similar to the clause in the bill of lading con-

tracts in the pending case. The Supreme Court worked out a conclusion which in effect exonerated the insurer from any liability under the terms of its policy because the loss in that case was a result of unseaworthiness of the carrying vessel, and there being no insurance recoverable, the ship carrier was held liable for damages caused by its negligence.

All that is said in the opinion of the Court does not deny, nor counteract the plain declaration that such a clause in the carrier's contract is valid, and that if a shipper under a bill of lading containing that provision effects insurance and is paid the full amount of his loss, *neither he nor the insurer can recover against the carrier.*

Respectfully submitted,
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LIST OF ADDITIONAL AUTHORITIES.

On the point that Cheney had no authority to make a contract for transportation of merchandise by a passenger train:

Elkins vs. Boston Ry. Co., 23 N. H. 275; St. Louis, Iron Mountain & So. Ry. Co. vs. Knight, 122 U. S. 79.

On the point that where a complaint states a cause of action based on ownership, evidence of an equitable interest only will not support the action:

Stout vs. McPheeters, 84 Ind. 585; Hunt vs. Campbell, 83 Ind. 48; Groves vs. Mark, 32 Ind. 319; Rowe vs. Beckett, 30 Ind. 154.

Where the gist of the action is the fact that property *owned* or possessed by the plaintiff has been injured, an allegation of the plaintiff's *ownership* or possession is material and failure to prove such allegation constitutes a fatal variance:

Raymond vs. Parisho, 70 Ind. 256.

On the law as to importation of merchandise purchased on letters of credit and trust receipts given in exchange for bills of lading, the following cases are in point:

In re Coe, 169 Fed. Rep. 1002, opinion by Judge Holt.

A firm of importing merchants paid for a shipment of ostrich feathers by a draft on a bank pursuant to a credit arrangement; the feathers were consigned to the bank as owner and it paid the draft for purchase price, transferred the bill of lading to the importers and took in exchange therefor a "trust receipt"; the importers received the goods to be sold and accounted for and the proceeds to be applied in repayment of the money advanced by the bank.

In the opinion the Court said:

> "The bills of lading under which the goods were shipped consigned the goods to the Sovereign Bank of Canada. When they arrived in New York, and the drafts accompanying the bills had been paid, the Sovereign Bank of Canada had the legal title to the goods. When it authorized the delivery of the goods to the firm of Cadenas & Coe, it took trust receipts which, by express agreement, retained the title to the

goods and their proceeds in the Sovereign Bank of Canada."

Charavay & Bodvin vs. New York Silk Mfg. Co., 170 Fed. 919—Circuit Court, S. D. New York—Affirms a referee's Report.

Syllabus.

"A bank which advances money or credit for the purchase of goods for import, taking the bills of lading in its own name, becomes the legal owner of the goods, but its title is not an absolute but only a security title. If it permits the importer to take the goods on signing a trust, and subject to the order of the bank until its advances are paid, the transaction is not a conditional sale, but one for security only, and, where the bank reclaims the property and sells it as authorized by the trust receipts, the debt is not thereby canceled, but the bank may recover any deficiency remaining."

In re Cattus, 183 Fed. 733—C. C. A. Second Circuit.

In this case, Ward, Circuit Judge, said:

"In this case the bank had accepted drafts to the amount of some £5,000, had delivered the bills of lading for most of the goods to Cattus against his trust receipts before his adjudication as a bankrupt, and still has in its hands bills of lading for other goods not so delivered."

And further, after quoting the trust receipt:

"The structure of the instrument indicates that it has grown gradually, being altered to meet new exigencies, just as we find in many commercial documents like charter-parties, master's drafts, and riders on policies of fire and marine insurance in artistic and inconsistent provisions. This trust receipt contains clauses some of which describe the right of the banker in the goods as property or title and others as a lien. But the inconsistency is apparent rather than real, because, as Judge Hough

pointed out in the court below, it admits easily of division into two parts: First, an acknowledgment that the bankers are owners until payment of the acceptance for the purchase price of the specific goods and thereafter they are lienors for any other balance of indebtedness due from the bankrupts, however arising. Inasmuch as the proceeds of all the goods as well as all the goods in specie now in the hands of the trustee and of the banker are insufficient to pay the acceptance for the price of the specific goods covered by the bills of lading attached to the acceptances, we need not consider the clauses of the trust receipt relating to liens for general indebtedness or determine whether such pledge or lien would be good against the trustee.

"The purpose of the parties, describe the trust receipt as you will, was to keep the title to the goods in the bankers until their acceptances for the price of the goods were paid. The courts without always defining exactly what the relation between the parties is or always defining it in the same way, still are astute to protect the rights of the banker in such case. Moors vs. Kidder, 106 N. Y. 32, 12 N. E. 818; Drexel vs. Pease, 133 N. Y. 129, 30 N. E. 732; National Bank vs. Rogers, 166 N. Y. 380, 59 N. E. 922; Moors vs. Drury, 186 Mass. 424, 71 N. E. 810; New Haven Wire Cases, 57 Conn. 352, 18 Atl. 266, 5 L. R. A. 300."

In re Shulman, 206 Fed. 129.

This case makes a clear distinction between a trust receipt given by an *owner* whereby he agrees to hold the goods as security for a debt due to a bank, and a case where title is vested in the bank; by reference to the Century Throwing Co. case, 192 Fed. 252, it recognizes the authority of Judge

Gray's decision as applicable to a case where the bank by virtue of bills of lading takes title to the goods.

In re Dunlap Carpet Co., 206 Fed. 731:

In this case goods were purchased in a foreign country on credit extended to a bank and shipped consigned to the bank; on arrival the bills of lading were endorsed and delivered to the importer and it received possession of the goods giving a trust receipt by the terms of which title was retained in the bank, but the importer was authorized to sell the goods on credit and did so; without having paid the selling price the vendee became a bankrupt; the importer made a claim against the bankrupt's estate and received a dividend thereon and then assigned to claim for the balance thereof and its assignee received a second dividend; thereafter within the time for presenting claims against the estate, the bank made a claim for the same debt, which was contested by the importer's assignee. The Court held that the importer had not acquired title to the goods, therefore the bank was the true owner of the claim and not estopped by the previous presentation and assignment thereof, by the importer.

Vaughn v. Massachusetts Hide Corporation, 209 Fed. 667.

This case, in a general way, supports and adds weight to the authorities affirming the banker's title under a trust receipt, but is not of any particular value in our case; it is too complicated by special

agreements and conditions and rights of numerous parties.

Assets Realization Co. v. Sovereign Bank, 210 Fed. 156—Decision by C. C. A., Third Circuit. Opinion by Judge Gray.

This is an excellent authority in point.

Syllabus.

A bank having furnished money or credit with which wool was imported from Russia, taking bills of lading in its own name and usual trust receipts, continued to be the owner when the wool was sold by the importer until title passed to the purchaser, who thereafter became a bankrupt, and then was the owner of the account for the purchase price. *Held,* that the bank alone was entitled to prove the claim for the price against the estate of the bankrupt purchaser, of which right it was not deprived by the fact that a claim was filed by the importer, and after payment of a dividend thereon was assigned to another whose claim would be expunged.

In re Killian Mfg. Co., 209 Fed. 498; affirmed by the C. C. A., Third Circuit, in Roth v. Smith, 215 Fed. 82.

These cases follow The Throwing Co. case, 197 Fed. 252, and hold that where the importer became bankrupt, the banker's title under a trust receipt is superior to that of the trustee of the bankrupt estate.

In re Richheimer, 221 Fed. 16—Decision by C. C. A. Seventh Circuit.

This is an adverse decision; the Court held that the effect and validity of the banker's title was

governed, not by the general commercial law, apart from the local law, but by the local law, as the ownership and transfer of and liens upon personal property which has come within a state are subject to and controlled by the policy adopted by such state.

In re Marks & Co., 222 Fed. 52—Decision by C. C. A., Second Circuit.

This was a bankruptcy case in which trust receipt transactions gave rise to the questions litigated. The trustee of the bankrupt estate contended that the documents and conduct of the parties constituted a chattel mortgage upon the goods, which was void as to creditors because not filed as required by the Lien Law of New York, and that "the whole thing was a sham. Answering this contention the Court said:

> "We do not concur in this view at all. The plain intention of the parties was that title to the goods should remain in the bankers until they were reimbursed for paying the price of them to the seller. * * * The subject has been so fully considered both in this Circuit and in the Third Circuit, that we shall do no more than refer to the decisions. Charavay & Bodvin Co. vs. York Silk Co. (C.C.), 170 Fed. 819; In re Cattus, 183 Fed. 733, 106 C. C. A. 171; Century Throwing Co. vs. Muller, 197 Fed. 252 (116 C. C. A. 614); In re Killian Mfg. Co. (D. C.), 209 Fed. 498; Assets Realization Co. vs. Bank, 210 Fed. 156, 126 C. C. A. 662."

In re Bettman-Johnson Co., 250 Fed. 657—Decision by C. C. A., Sixth Circuit.

This is another adverse decision.

Syllabus.

"Contracts of conditional sales are good as between the parties, though not recorded; but, unless Gen. Code Ohio, sec. 8568, is complied with, the rights of the seller are inferior to those of creditors, who have fastened upon the property by some specific lien.

"The appointment of a receiver, who took charge of the property of an Ohio manufacturer, including that which had been delivered under a trust receipt, which was neither verified nor filed as required by Gen. Code Ohio, sec. 8568, fastens the claims of creditors upon it as effectually as though the creditors had seized the same under attachment or levy of execution."

If these apparently adverse decisions shall be cited against us, we can rely that in this case we are not confronted with any rights of creditors, *bona fide* purchasers or conflicting local statutes; and they are, in effect, overruled by the Supreme Court in the following case:

Com. Nat. Bank vs. Canal-Louisiana B. & T. Co., 239 U. S. 520, 60 L. Ed. 417.

In this case the controversy was between two banks, each claiming ownership of cotton in the custody of the trustee of a bankrupt's estate. The bankrupt had pledged the cotton as security for advances of money to the Canal-Louisiana Bank, by delivery of bills of lading representing the cotton, and had obtained possession of the bills of lading, giving in exchange a trust receipt, and having those documents, obtained possession of the cotton and stored it, taking negotiable warehouse receipts

therefor; the warehouse receipts were then pledged to the Commercial National Bank as security for additional money; the bankrupts next obtained possession of the warehouse receipts, giving in exchange a trust receipt. So that the two contending banks were pledgees of the same property, each having a trust receipt as its muniment of title; and to determine which should prevail over the other was the task undertaken by the Courts. If the principle controlling the decisions in the Richheimer and Bettman-Johnson Co. cases had been applied, the cotton might have been awarded to the trustee in bankruptcy, who had possession of part of it. The District Court, however, gave its decision in favor of the elder pledgee-holder of the trust receipt taken in exchange for the bills of lading (205 Fed. 568); and that decision was affirmed by the C. C. A. (211 Fed. 337). The Supreme Court reversed the lower courts and gave the cotton to the latest victim of the bankrupt's fraudulent practices. The importance of this case is in the fact that the Supreme Court sanctioned the rulings in the case hereinbefore cited. In the opinion Mr. Justice Hughes said:

> "We assume that under the jurisprudence of Louisiana the transaction between Dreul & Company and the Canal-Louisiana Bank (described by the bank as a pledge), created rights in the bank in the nature of ownership for the purpose of securing its advances (Rev. Stats. (La.) 2482; Civil Code, arts. 3157, 3158, 3170, 3173; Fidelity & D. Co. vs. Johnston, 117 La. 880, 889, 42 So. 357; Act 94 of 1912 (Uniform Bills

of Lading Act), #32): and that when the Canal-Louisiana Bank intrusted the bills of lading to Dreuil & Company for the purposes described in the trust receipts, given to that bank, it could still assert its title as against Dreuil & Company and their trustees in bankruptcy. See Clark vs. Iselin, 21 Wall. 360, 368, 22 L. Ed. 568, 571; Re E. Reboulin Fils & Co., 165 Fed. 245; Charavay vs. York Silk Mfg. Co., 170 Fed. 819; Re Cattus, 106 C. C. A. 171, 183 Fed. 733; Century Throwing Co. vs. Muller, 116 C. C. A. 614, 197 Fed. 252; Re Dunlap Carpet Co., 206 Fed. 726; Assets Realization Co. vs. Sovereign Bank, 126 C. C. A. 662, 210 Fed. 156; Moors vs. Kidder, 106 N. Y. 32, 12 N. E. 818; Drexel vs. Pease, 133 N. Y. 129, 30 N. E. 732; Moors vs. Wyman, 146 Mass. 60, 15 N. E. 104; Moors vs. Drury, 186 Mass. 424, 71 N. E. 810; Hamilton vs. Billington, 163 Pa. 76, 43 Am. St. Rep. 780, 29 Atl. 904; Williston, Sales, #437. No question is presented as to the effect, in the light of the Uniform Bills of Lading Act passed in Louisiana in 1912 (Act 94), of an attempted negotiation by Dreuil & Company of the bills of lading contrary to the terms of the trust receipts. See Roland M. Baker Co. vs. Brown, 214 Mass. 196, 203, 100 N. E. 1025. The bills of lading were not negotiated; they served their purpose, being surrendered to the railroad company on the delivery of the goods to Dreuil & Company. The transactions with the 'pickery' are not material to the question to be decided. Dreuil & Company having obtained possession of the cotton, as we contemplated, placed it in store, and the question is as to the effect of the negotiation of the warehouse receipts to the Commercial Bank."